Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TAMKO ROOFING PRODUCTS, INC.,

Petitioner,

v.

UNITED STEEL WORKERS OF AMERICA,
LOCAL 1071L,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an arbitral award reinstating an employee — who has been terminated for racial harassment of a *non*-company employee — on the ground that the employer's disciplinary authority is strictly limited to punishing racial harassment of other company employees violates public policy and is thus unenforceable by a court.

CORPORATE DISCLOSURE STATEMENT

Petitioner Tamko Roofing Products, Inc. has no parent corporations, and no publicly held company owns 10% or more of the corporations's stock.

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PETITION FOR A WRIT OF CERTIORARI

Tamko Roofing Products, Inc. ("Tamko") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The opinions of the court of appeals (Pet. App. 1a-4a) and the district court (Pet. App. 5a-20a) are not reported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on July 3, 2001. The court of appeals denied Tamko's petition for rehearing on September 4, 2001. Pet. App. 48a-49a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1981 and 2000e-2 of Title 42, United States Code, and section 185 of Title 29, United States Code, are set forth in the appendix. Pet. App. 21a-32a.

STATEMENT

Since the Civil War, the nation has taken a strong stand, in both positive law and federal public policy, against race discrimination. Congress long ago enacted laws prohibiting race discrimination by State and local actors. The federal courts have long refused to enforce, for example, racially restrictive covenants. And, in the private sector, the strong federal policies against race discrimination in the workplace and in favor of employers' voluntary compliance with the prohibitions on race discrimination are, among other things, grounded in positive, statutory law, including the anti-discrimination provisions of Title VII, 42 U.S.C. § 2000e-2(a), and 42 U.S.C. § 1981, and the federal common law of labor-management relations authorized by 29 U.S.C. § 185.

This case presents the important and recurring question whether a labor arbitrator's award reinstating a discharged employee on the ground that, under work rules established under a collective bargaining agreement, the employer is without authority to discharge employees for racially harassing *non*-employees violates these fundamental federal public policies against race discrimination and in favor of voluntary employer compliance with them. The district court in this case recognized that such an arbitral award is indeed at odds with federal public policy and properly refused to enforce that arbitral award. The contrary decision of the court of appeals is at odds with the practice of federal courts not to approve contracts that condone racial discrimination. It rests upon the erroneous premises, rejected by other courts of appeals, that an employer's failure to terminate employees who racially harass non-employees does not expose the employer to liability under Title VII or section 1981 and that federal law of collective bargaining allows an employer to agree with a union not to discharge employees who engage in such racial discrimination.

The decision below deepens an extant judicial conflict regarding whether public policy permits arbitrators to order the reinstatement of employees who are discharged for sexually or racially harassing non-employees. Indeed, the decision stands alone among judicial decisions in allowing such employees to be reinstated without *any* discipline having been imposed This Court's intervention is necessary.

1. Tamko, a manufacturer and distributor of commercial and residential roofing products, maintains a manufacturing facility in Tuscaloosa, Alabama. Pet. App. 6a. Tamko retains the services of Cummings Truck Line ("Cummings") to transport materials to and from its Tuscaloosa plant. During the relevant time frame, Cummings employed Nathaniel Williams, an African American, to work full-time at the Tamko facility as a truck spotter, coordinating the movement of Cummings trailers into and out of Tamko's loading

dock bays with the personnel in Tamko's shipping and receiving department. Pet. App. 6a-7a. One such Tamko shipping employee was Bobby Campbell, the grievant. Pet. App. 6a.

On October 27, 1997, Tamko's Tuscaloosa shipping department supervisor received a complaint from Mr. Williams about Mr. Campbell's conduct. Specifically, Mr. Williams notified Tamko that Mr. Campbell had racially harassed him. Pet. App. 8a.

In the course of its prompt investigation of this charge, Tamko learned from Mr. Williams that Mr. Campbell had repeatedly harassed Mr. Williams using offensive, racist epithets such as "gig-a-boo," "biscuit lips," and "porch monkey" to refer to Mr. Williams. Pet. App. 46a. Mr. Williams indicated that this conduct had been occurring "often like once every week or twice a week or just nearly every week." Pet. App. 47a. The last such incident, which prompted Mr. Williams to complain to Mr. Campbell's supervisor, had occurred that very morning (of October 27, 1997), at approximately 6:00 a.m. Pet. App. 6a. While the witnesses' recollections vary as to the precise words that Mr. Campbell uttered on this particular occasion, it is undisputed that the substance of the remarks suggested that Mr. Williams should paint his face white so that Mr. Campbell could see him more easily. Pet. App. 7a-8a.

On the basis of its investigation of Mr. Williams's complaint, Tamko terminated Mr. Campbell's employment. Pet. App. 9a-10a. The Tuscaloosa plant general manager who made the discharge decision, Tom Deloughery, explained that the decision to fire Mr. Campbell was based upon the seriousness of Mr. Campbell's conduct coupled with the fact that Mr. Campbell had attended a workshop focusing on the prevention of racial, sexual, and other forms of harassment in the workplace less than two weeks before the incident that prompted Mr. Williams's complaint. Pet. App. 10a. Mr. Deloughery pointed to Tamko's policy against harassment in the workplace. Pet. App. 10a.

2. Mr. Campbell's union, respondent United Steelworkers of America, AFL-CIO, Local 1071L (the "Union"), processed Mr. Campbell's grievance through the procedure set out in the parties' collective bargaining agreement (the "CBA"). Pet. App. 10a. Tamko denied the grievance, and the Union submitted the matter to arbitration pursuant to the terms of the CBA. Pet. App. 39a.

The CBA provides that "[e]mployees shall not be discharged or suspended without just cause." Pet. App. 39a. The CBA further provides for the arbitration of grieved disciplinary measures, and provides that, in such arbitrations, "the arbitrator's authority and function shall be limited to answering the following questions: (1) whether the conduct or actions of the grievant which led to the discharge or discipline did, in fact, occur and, if so (2) whether such conduct or actions by the grievant justified disciplinary action by the Company. . . . *The arbitrator shall have no authority in discharge or disciplinary cases to substitute his judgment for that of the Company in respect to the appropriate degree of discipline.*" Pet. App. 40a-41a (emphasis added).

On September 10, 1998, the arbitrator, J. Reese Johnston, Jr., sustained the grievance, directing Tamko to reinstate Mr. Campbell, and "to compensate him for all lost wages and other benefits and without a break in his seniority." Pet. App. 45a. Although he made no findings with respect to the earlier episodes of harassment called to his attention by Tamko, the arbitrator found that the reported incident of racial harassment had, in fact, occurred on October 27, 1997. Pet. App. 35a. The arbitrator held, however, that Mr. Campbell should nonetheless be reinstated because of the arbitrator's construction of the Tamko anti-harassment policy's prohibition that "[n]o employee of Tamko should harass others, be they co-workers, subordinates or supervisors." Pet. App. 43a.

Specifically, reading the final clause of the sentence as a limitation on the word "others," the arbitrator found that Tamko "prohibits

har[]assment only to co-workers, subordinate or superior," and not harassment of non-employees, even those working full-time on Tamko premises such as Mr. Williams. Pet. App. 43a. Indeed, the arbitrator ruled that "[i]t would not be equitable . . . to stretch the wording which is the Company's wording in its Prevention of Har[]assment Policy to cover the har[]assment of people not co-workers, subordinates or supervisors." Pet. App. 43a.

Based upon this premise, the arbitrator held that the CBA did not allow termination of Mr. Campbell in these circumstances. He concluded that "the Company charged the Grievant with an offense that can only arise in har[]assment of a co-worker of the Grievant." Pet. App. 44a.

3. On October 6, 1998, Tamko filed a complaint in district court, seeking vacatur of the arbitrator's award on the ground, *inter alia*, that the award violates federal public policy. On August 31, 2000, the district court granted Tamko's motion for summary judgment, denied the Union's summary judgment motion, and vacated the arbitrator's award. Pet. App. 20a.

The district court began its analysis with the premise that, "[u]nless the award is merely the arbitrator's 'own brand of industrial justice' or does not 'dra[w] its essence from the collective bargaining agreement,' a court is generally bound to enforce the award." Pet. App. 12a. But the district court also recognized that "[t]here is a narrow exception to the general judicial enforceability of arbitration awards: an arbitration award that contravenes public policy is unenforceable." Pet. App. 13a. Specifically, the district court found that "a court may refuse to enforce a[n] award . . . where the award would violate some explicit, well-defined and dominant public policy." Pet. App. 14a.

In this regard, the district court found that "[r]acial harassment in the workplace violates 42 U.S.C. § 2000e (Title VII)'s ban prohibiting racial discrimination . . . ." Pet. App.18a. The district

court also found that "42 U.S.C. § 1981, whose roots have grown and developed over the last one and a third century, and particularly in the la[st] nine years, establishes a dominant national policy forbidding racial discrimination and harassment in the workplace." Pet. App. 19a. The court further found that "the national policy is binding on unions as well as employees." Pet. App. 19a. Finally, noting that "Bobby Campbell violated this public policy while performing his duties as an employee of Tamko," the court held that the arbitral award requiring Mr. Campbell's reinstatement with back pay "should not be enforced by this court." Pet. App. 20a.

4. On appeal, the Eleventh Circuit reversed. At the outset of its analysis, the court of appeals acknowledged that "an arbitral award which is contrary to public policy is unenforceable." Pet. App. 2a. The court of appeals further acknowledged that, under this Court's decision in *Eastern Associated Coal Corp. v. United Mine Workers of America, District 17*, 531 U.S. 57 (2000), the court must treat the arbitral award as if it represents an agreement between the parties as to the proper meaning of the collective bargaining agreement. Pet. App. 2a. Accordingly, the court of appeals recognized that "the issue in this case is whether the arbitral award, which ordered that Campbell be reinstated to his previous position with back pay, is contrary to an explicit, well-defined and dominant public policy." Pet. App. 2a-3a. But, turning to its own analysis of the public policy issue, the Eleventh Circuit concluded that the arbitrator's award did not violate such a public policy.

In so concluding, the court of appeals did not deny that federal anti-discrimination and labor laws exhibit a dominant and well-defined public policy against racial harassment in the workplace. Rather, the court concluded that "nothing in the award is inconsistent with such a policy." Pet. App. 3a. The court asserted, without explanation, that the award "does not condone [the grievant's] harassing behavior . . . ." Pet. App. 3a. The court of appeals further asserted, without analysis, that "[r]einstating with

backpay, i.e., not discharging, an employee who made the single racially insensitive remark that Campbell did does not violate any provision of Title VII, or of any other law, including decisional law, or any regulation." Pet. App.3a. The court concluded, "[t]herefore, . . . the award does not run contrary to an explicit, well-defined, and dominant public policy." Pet. App. 3a.

Finally, the court of appeals opined that, after reinstating Mr. Campbell with back pay, Tamko might attempt to impose some form of "discipline other than discharge" upon Mr. Campbell. But the court also acknowledged that any such measure would be subject to further grievance procedures, and it expressed no opinion concerning whether public policy would require that any such discipline be sustained. Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

Regrettably, racial and sexual harassment against both employees and non-employees continues to be a recurring problem in today's modern workplaces. Notwithstanding both the strong condemnation of such harassment by this Court and the Congress, and this Court's continuing recognition that federal courts should not enforce contracts or arbitration awards that offend such public policy, the courts of appeals remain deeply divided over the proper approach to take in cases where arbitral awards order reinstatement of employees who have been discharged for racial or sexual harassment — particularly where the harassment involves non-employees. The courts of appeals have adopted substantially different approaches to that question, and this Court's most recent decision in the "public policy" doctrine area, *Eastern Associated Coal Corp.*, does not purport to address or resolve the matter. Thus, this Court's intervention is needed, both to provide much needed guidance to the confused lower courts and to reinforce the nation's condemnation of contracts approving race discrimination

and its efforts to promote voluntary compliance with federal anti-discrimination policy.

I. THE DECISION BELOW DEEPENS AN EXISTING CIRCUIT SPLIT CONCERNING WHETHER ARBITRAL AWARDS REINSTATING EMPLOYEES WHO HAVE ENGAGED IN HARASSMENT VIOLATE PUBLIC POLICY AND ARE UNENFORCEABLE.

As noted by the district court in this case, Pet. App.15a-18a, there is a multi-circuit split of authority over the question whether arbitral awards reinstating employees who have engaged in sexual or racial harassment violate a sufficiently express, well-defined, and dominant public policy such that they are unenforceable. Commentators have also noted this deep judicial conflict. *See, e.g.*, Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 Harv. Women's L.J. 17, 17 (1994) (noting the "divergent" decisions among the courts of appeals on the issue, with "[t]wo courts [then having] upheld the arbitrator's decision to reinstate the discharged employee" and "[t]wo courts [having] vacated the award as contrary to public policy"). Specifically, decisions of the Fourth, Seventh, and Tenth Circuits flatly conflict with decisions of the Second and Third Circuits in their treatment of the issue, and the Eleventh Circuit in this case has now adopted a third approach that is inconsistent with both lines of cases.

The decision below is, for example, directly contrary to the Third Circuit's decision in *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*, 969 F.2d 1436 (3d Cir. 1992). That case involved a bakery employee who had been discharged for sexually harassing a customer's employee on the premises of the customer's business. *See id.* at 1438-39. The employee's union grieved the discharge, and the arbitrator issued an award ordering the employee's reinstatement on the ground that the

bakery had not adequately investigated the circumstances of the alleged harassment. *See id.* at 1439. As here, the district court vacated the arbitrator's award, finding it to be violative of public policy. *See id.* at 1440. Unlike here, the Third Circuit affirmed, finding that there are "well defined and dominant public polic[ies]" that "can be ascertained by reference to law and legal precedent" both "concerning sexual harassment in the workplace" and "favoring voluntary employer prevention and application of sanctions against sexual harassment in the workplace." *Id.* at 1441-42. The court held that the award violated those public policies both because it "would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred," and because "it undermines the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace." *Id.* at 1442. *Stroehmann Bakeries, Inc.* cannot be reconciled with the decision below, which reversed a district court's finding of a public policy violation where the misconduct underlying the decision was *not* disputed.

The Second Circuit has also held, in conflict with the decision below, that the public policy against discrimination in the workplace embodied in Title VII and related laws precluded enforcement of an arbitral award reinstating an employee who had been discharged for sexual harassment. *See Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO*, 915 F.2d 840 (2d Cir. 1990). *Newsday, Inc.* involved a discharge of an employee for sexually harassing several co-workers. *See id.* at 842. The arbitrator ruled in favor of the union's grievance and ordered reinstatement, concluding that "[t]hese offenses are not ones that call for immediate discharge; instead, such offenses call for the application of progressive discipline." *Id.* at 843. The district court vacated the award as contrary to public policy, *see id.* at 842-43, and the Second Circuit affirmed. The *Newsday, Inc.* court acknowledged the "well-recognized" public policy against

harassment in the workplace, as set out in Title VII, and noted that "Title VII places upon an employer the responsibility to maintain a work place environment free of sexual harassment." *Id.* at 844. The Second Circuit concluded that the public policy against harassment "is subverted when an employer is required to reinstate an employee who is a chronic sexual harasser." *Id.* at 843. Indeed, the court concluded that reinstating the employee would "completely disregard[] the public policy against sexual harassment in the work place," and, "[a]bove all," would "prevent[] Newsday from carrying out its legal duty to eliminate sexual harassment in the work place." *Id.* at 845.

The decision below is also inconsistent with another line of cases that, while holding that public policy does not require the discharge of every harasser, recognizes that public policy requires an arbitration award to itself provide for at least some discipline for an employee engaging in racial or sexual harassment. For example, in *Westvaco Corp. v. United Paperworkers International Union, AFL-CIO*, 171 F.3d 971 (4th Cir. 1999), while the Fourth Circuit reversed a district court's application of the public policy doctrine to an arbitral award reinstating an employee discharged for sexual harassment, it expressly recognized that public policy nonetheless required that the arbitration award provide for at least some lesser discipline instead of discharge. *See id.* at 973-74, 977. The Fourth Circuit reasoned that, "while it is certainly true that there is a public policy against sexual harassment, the district court formulated it in too general a fashion." *Id.* at 977. The court held that "[t]here is no public policy that every harasser must be fired," but rather "a company must exercise reasonable care to prevent and correct promptly any sexually harassing behavior." *Id.* at 977 (internal quotation marks and brackets omitted). The court held that the "strict" nine-month suspension imposed by the arbitrator in lieu of termination satisfied that obligation. *See id.* The Fourth Circuit emphasized that it was adopting "a narrow implementation" of the

public policy exception due to its "reluctance to invoke broad nostrums of public policy to void private bargains." *Id.* at 978.

The Seventh Circuit came to a similar conclusion in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America, AFL-CIO*, 959 F.2d 685 (7th Cir. 1992). The grievant in *Chrysler Motors Corp.* had been terminated by an automobile manufacturer for sexually assaulting a female co-worker and then was reinstated by a labor arbitrator. *See id.* at 686. While acknowledging that "[t]he public policy against sexual harassment in the work place is well-recognized," *id.* at 687, and that "[e]mployers must take all necessary steps to prevent sexual harassment in the work place," *id.* at 687-68, the Seventh Circuit found that the arbitrator's decision that "a 30-day suspension rather than discharge was an adequate sanction" was reasonable, and thus that the award should be allowed. *Id.* at 689.

Finally, the Tenth Circuit addressed an arbitrator's award reinstating an employee who had been fired for sexually assaulting a customer in *Communication Workers of America v. Southeastern Electric Cooperative*, 882 F.2d 467 (10th Cir. 1989). In that case, a utility company sued, challenging the validity of an award reducing a termination of a harasser to a one-month suspension. *See id.* at 468. The court noted that the arbitrator's decision finding that there was no just cause for the employer to terminate the grievant, but rather only cause to impose lesser sanctions, "fully incorporated th[e] important concern" with "preventing the sexual assault and abuse of women," precisely because the arbitrator had considered those concerns and addressed them through the lesser sanctions. *Id.* at 469. The Tenth Circuit stated that, in such circumstances, a court "cannot substitute [its] understanding of the workplace and judgment of [the grievant's] conduct" for that of the arbitrator. *Id.*

This latter group of decisions is inconsistent with the Eleventh Circuit's decision below. As noted, each of these decisions expressly relied upon the arbitrator's imposition of lesser punishments in finding that the challenged award did not violate public policy. The decision below, on the other hand, upheld the validity of an award that found the grievant's harassing behavior not to be cognizable under the company anti-harassment policy as an initial matter, Pet. App. 43a-44a, and which itself substituted no lesser penalty on the harasser. The arbitrator and, by enforcing the arbitrator's award, the court below did not understand "public policy" to require the imposition of any sanction for the racial harassment of a non-employee, whereas these other three circuits held that public policy requires at least some such sanction for the harassment (albeit not necessarily discharge, as the Third and Second Circuits have held).

In sum, the courts of appeals are split three ways on the question whether an arbitrator's award reinstating an employee who has been discharged for racial or sexual harassment — including harassment of non-company personnel — violates a well-defined and dominant public policy and is thus unenforceable. Two circuits have held that such awards violate public policy when they overturn an employer's discharge decision; three circuits have held that such awards are permissible where they replace the termination sanction with a lesser punishment adequate to implement the public policy against discrimination in the workplace; and one circuit — *i.e.*, the court below — has held that such awards are permissible even without any alternative punishment whatsoever being imposed as part of the arbitral decision. As noted above, commentators have repeatedly acknowledged this judicial split. *See, e.g.*, Stephen Buehrer, *A Clash Of The Titans: Judicial Deference To Arbitration And The Public Policy Exception In The Context Of Sexual Harassment*, 6 Am. U. J. Gender & L. 265, 267, 281 (1998) (discussing "the current split" among the courts of appeals);

id. at 297 ("Given the current confusion over the scope and breadth of the public policy exception, the United States Courts of Appeals split when faced with arbitration awards returning accused harassers to the workplace."); Sarles, *supra*, 17 Harv. Women's L.J. at 17 (noting the "divergent" court of appeals decisions); Chris Baker, *Sexual Harassment v. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy?*, 61 U. Cin. L. Rev. 1361, 1361-62 (1993) (noting that "the federal circuits are split concerning the proper scope of the public policy exception to labor arbitral awards").

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING AND IN NEED OF PROMPT RESOLUTION BY THIS COURT.

While judicial uncertainty of the degree exhibited by the courts of appeals on this issue would warrant review by the Court in any event, a prompt resolution of this conflict is particularly imperative here. This case involves a confluence of considerations heightening the need for a prompt and uniform national resolution of the question presented.

In the first place, resolution of the conflict is necessary to promote the long-recognized and fundamental federal objective of combating race discrimination, an area where national uniformity and commitment is of central importance. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) ("[E]very pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination."). This Court has long stood vigilant in protecting "our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989); *accord, e.g., Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from

denial of cert.) (acknowledging the strong interest "in preventing private 'discrimination'" on the basis of race). This judicial supervision is particularly appropriate in the context of the public policy doctrine, which is directed toward preventing harms in broad classes of cases by deterring the formation of improper contracts, and not just toward remedying the immediate case at hand. *See, e.g., Weil v. Neary*, 278 U.S. 160, 173-74 (1929) ("What is struck at in the refusal to enforce contracts [that violate public policy] is not only actual evil results but their tendency to evil in other cases."). Indeed, courts have led the attack on race discrimination by, among other things, refusing to enforce contracts that condone racial discrimination. *See, e.g., Hurd v. Hodge*, 334 U.S. 24 (1948).

Second, and regrettably, the problem of workplace discrimination generally, and harassment in particular, remains significant. Roughly 29,000 claims of racial harassment and other forms of racial discrimination have been filed every year between 1992 and 2000. *See* "Charge Statistics FY 1992 Through FY 2000," at www.eeoc.gov/stats/charges.html. The trend in the federal courts has also been toward continued large numbers of similar claims; the number of employment discrimination cases filed has generally risen, from 8,563 in 1988 to 21,111 in 2000. *See* Richart T. Seymour & John F. Aslin, *Equal Employment Law Update* at viii (2000 ed.). Moreover, as this Court's own docket illustrates, racial and sexual harassment claims constitute a sizeable portion of such claims. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (holding that workplace harassment may be cognizable under Title VII even if it does not seriously affect the employee's psychological well-being); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (establishing the conditions for vicarious employer liability for workplace harassment); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998) (same). Where so many claims arise, the need for clear rules about the

circumstances in which courts may properly intervene to overturn arbitration awards involving such claims is especially important.

Finally, the need for clear rules is also heightened in this labor-management context. These arbitration cases arise under section 301 of the Labor-Management Relations Act. "The subject matter of § 301(a) is peculiarly one that calls for uniform law." *Local 174, Teamsters, Chaukfeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (internal quotation marks omitted); *accord, e.g., Int'l Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 859 (1987) (noting need for national uniformity in discussing scope of preemption). Yet the deep split in the federal judiciary regarding the question presented for review in this case undermines this important policy in favor of national uniformity of legal principles affecting labor-management relations. As one writer has concluded in urging the Court to resolve the circuit split at issue in this case, this "is exactly the type of issue a court of last resort should decide." Baker, *supra*, 61 U. Cin. L. Rev. at 1362; Buehrer, *supra*, 6 Am. U. J. Gender & L. at 292-93 ("Until the Supreme Court clarifies the appropriate scope of the [public policy] exception, decisions will continue to vary in their application of the doctrine.").

III. THE DECISION BELOW MISUNDERSTANDS AND MISAPPLIES THE PUBLIC POLICY DOCTRINE.

On the merits, the decision below is plainly in error. The decision below upholds an arbitral award requiring reinstatement of, and back pay and benefits for, an employee on the sole ground that the employee racially harassed a *non*-employee rather than an employee. The award itself provides for no discipline at all for the racial harassment that occurred here; and, while the court below raised the possibility that the employer might still be able to impose an alternative sanction, the court below refused to even express an

opinion about whether any such discipline would be permitted by the collective bargaining agreement or required by public policy. As issued, the arbitration award in effect condones racially discriminatory behavior by barring the employer's punishment of it, and the award (and the decision approving it) thus violates the deeply entrenched public policies against racial discrimination in contracts and in the workplace, as reflected in Title VII, section 1981, and the LMRA, as well as the federal public policy favoring voluntary employer compliance with federal anti-discrimination principles.

A. The Public Policy Doctrine Ensures That Courts Do Not Enforce Illegal, Immoral, or Unconscionable Contracts.

It is well-settled that, at common law, courts properly refused to enforce illegal or immoral contracts as violative of public policy. *See, e.g.*, *Trist v. Child*, 88 U.S. 441, 448 (1874) ("It is a rule of the common law of universal application, that where a contract express or implied is tainted [because it is illegal or inconsistent with sound policy and good morals], as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice."); *see also Oscanyan v. Arms Co.*, 103 U.S. 261, 267 (1880) (refusing to enforce "a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality and public policy"). This common law principle is set out in the Restatement (Second) of Contracts, which provides that "[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement (Second) of Contracts § 178(1); *see also id.* § 179 (noting that public policy may be derived from "legislation relevant to such a policy" or "the need to protect some aspect of the public welfare"). The public policy doctrine has its

roots in the common law principle that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." *Holman v. Johnson*, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (K.B. 1775).

As this Court has repeatedly recognized, the public policy doctrine remains a vital part of Anglo-American jurisprudence, including federal jurisprudence. *See, e.g.*, *Eastern Associated Coal Corp.*, 531 U.S. at 63. The doctrine finds its continuing justification in the fact "that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987). The Court has applied these principles to find unenforceable private agreements that violate provisions of positive law or general principles of public policy that are "well-defined and dominant." *W.R. Grace & Co. v. Local Union 759, Int'l Union of Limited Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983).

For example, *Trist* involved an action seeking to enjoin a claimant from recovering money from the United States treasury until the claimant paid for the respondent's services in lobbying the Congress to pay the claim. *See* 88 U.S. at 441-42. While the Court held that the requested injunction was not a proper remedy for a private agreement and was precluded by statute, the Court placed primary emphasis on "an objection of still greater gravity," the public policy doctrine. *Id.* at 448. Tracing the doctrine back to Roman law, *see id.*, the Court emphasized that "[i]n our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals." *Id.* The Court collected over a dozen cases applying this principle to preclude the enforcement of private contracts, *see id.* at 449, and concluded that the contract at issue,

which "was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate," was "contrary to the plainest principles of public policy." *Id.* at 451.

More recently, in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), this Court applied the public policy doctrine to allow an illegality defense in an action to enforce contracted contributions to union welfare funds. *See id.* at 74-76. Noting that "[t]here is no statutory code of federal contract law," the Court nonetheless found that its "cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law." *Id.* at 77. In that case, the Court held that, if the parties' agreement ran contrary to the Sherman Act or the National Labor Relations Act, the federal courts should properly decline enforcement. *See id.* at 87-89.

Perhaps even more to the point here, the Court applied the public policy doctrine in the context of private racial discrimination in the seminal case of *Hurd v. Hodge*, 334 U.S. 24 (1948). *Hurd*, a companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948), involved the attempted enforcement of a racially restrictive covenant in the deeds to several residential lots. *See* 334 U.S. at 26. The Court held "that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States." *Id.* at 34. "Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Id.* at 35. Declining to "presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States," the Court held that such racially restrictive covenants are judicially unenforceable. *Id.* at 35-36.

The application of the public policy doctrine to labor arbitrators' awards is a special and, indeed, more powerful application of these longstanding principles. *See, e.g.*, *W.R. Grace*, 461 U.S. at 766. In labor cases, Congress has conferred a unique "common lawmaking" power upon the federal courts. *See Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (holding that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws"); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 403 (1988) (noting broad federal common lawmaking power in "controversies involving collective-bargaining agreements"). The "public policy" doctrine is a natural application of this congressionally-conferred common lawmaking power. *See, e.g.*, *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701 (1966) (acknowledging that "there are problems so vital to the implementation of federal labor policy that they will command a high degree of inventiveness from the courts").

B. The Arbitral Award In This Case Violates Well-Defined And Dominant Public Policies Against Contracts Condoning Racial And Sexual Harassment In The Workplace And Favoring Voluntary Compliance With Anti-Discrimination Laws.

The arbitration award under review in this case should be held unenforceable under this public policy doctrine, as it violates well-defined and dominant public policies against contracts condoning race discrimination and in favor of voluntary compliance with anti-discrimination laws. The arbitrator's award reinstating the grievant is expressly premised upon his determination that, under the workplace rules established pursuant to this collective bargaining agreement, Tamko was without authority to discharge the grievant for harassing non-employees. Pet. App. 44a ("[I]t is my finding that the Workplace Har[]assment Policy specifically is limited to

har[]assment between an employee and other employees."). Thus, the award did not involve the propriety of the remedy — the question where deference to the arbitrator's judgment is at its zenith. *See United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (holding that the proposition that deference to labor arbitrators is appropriate "is especially true when it comes to formulating remedies" (quoted with emphasis added in *Misco, Inc.*, 484 U.S. at 41)). Rather, the arbitrator decided that the conduct of racially harassing non-employees working full-time on Tamko premises was not punishable by discharge in this case as an initial matter, pursuant to the workplace rules limited by the collective bargaining agreement. Pet. App. 43a-44a. Under *Eastern Associated Coal* and earlier cases, therefore, the Court must treat the arbitrator's award as if it reflects an agreement of the parties not to discharge an employee for racially harassing non-employees. 531 U.S. at 62. But such an agreement is plainly at odds with well-defined and dominant public policy; and the court of appeals's decision nonetheless sustaining the award should be reversed.

The Eleventh Circuit's first error was in its simple equation of the scope of the public policy doctrine with the requirements of positive law. The decision below determined that the award "does not violate any provision of Title VII, or of any other law, including decisional law, or any regulation." Pet. App. 3a. From this premise, the court immediately proceeded to the conclusion that, "[t]herefore, we conclude that the award does not run contrary to an explicit, well-defined, and dominant public policy." Pet. App. 3a. This conclusion is accompanied by a citation to *Eastern Associated Coal Corp*; but that case expressly rejected any such limitation on the public policy doctrine. *See* 531 U.S. at 63. While Justice Scalia argued that the public policy doctrine should be cabined to the positive law, *see* 531 U.S. at 67-69 (Scalia, J., dissenting), the majority expressly declined to do so, *see id.* at 63

(agreeing, "in principle, that court's authority to invoke the public policy exception is *not* limited solely to instances where the arbitration award itself violates positive law" (emphasis added)). Moreover, as noted above, the public policy doctrine has historically extended beyond positive law to prohibit judicial enforcement of immoral as well as illegal agreements; and where racially restrictive covenants were in issue, the Court expressly went beyond positive law in holding them to be against public policy. *See, e.g., Hurd*, 334 U.S. at 34-35. The Eleventh Circuit's complete failure to address whether federal race discrimination policy may also extend beyond positive law in this context, and thereby prevent enforcement of arbitral awards reinstating individuals who racially harass non-employees, underscores that court's failure adequately to appreciate the important public policies at issue in this case (much less the degree to which the award frustrates those public policies). Indeed, the arbitral award, and the decision approving it, are irreconcilable with the long-standing policy of courts not to enforce contracts that condone racial discrimination. *See, e.g., id.*; *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that race-based admission policies to private schools violate section 1981).

In any event, the Eleventh Circuit's unelaborated conclusion that the award "does not violate any provision of Title VII, or of any other law, including decisional law, or any regulation," Pet. App. 3a, is demonstrably wrong. As noted above, under *Eastern Associated Coal Corp.* and earlier cases, the arbitrator's conclusion that the grievant may not be discharged for racially harassing a non-employee (as opposed to an employee) must be presumed to reflect a contractual agreement of the parties. But any such agreement is flatly incompatible with Title VII and section 1981, as interpreted in the case law, and with the applicable regulations; such an agreement providing for no discipline for a

racial harasser would plainly frustrate the terms and objectives of the nation's anti-discrimination laws.

To begin with, the Fifth Circuit long ago expressly rejected the argument that a charge of discriminatory conduct "could not relate to an unlawful employment practice because it alleges discrimination directed to [the employer's] patients and not toward any employee." *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). Concluding that "a working environment heavily charged with discrimination may constitute an unlawful practice," *Rogers* held that an employer may be held liable under Title VII for allowing discrimination against *non*-employees. *Id.* at 239. This Court favorably discussed *Rogers* "[i]n concluding that so-called 'hostile environment' (*i.e.*, non *quid pro quo*) harassment violates Title VII" in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986). The Court's approval of "hostile environment" Title VII liability itself reflects the possibility that liability can be established based upon pervasive discrimination against non-employees. *See also Harris*, 510 U.S. at 21-23. In short, although the arbitrator and the court below appeared not to appreciate it, "[i]t is well-established that discrimination against non-employees can pollute a work environment in violation of Title VII." *Anthony v. County of Sacramento*, 898 F. Supp. 1435, 1448 (E.D. Cal. 1995).

In any event, 42 U.S.C. § 1981 undisputedly extends far outside the employment context to prohibit harassment in the performance of contractual obligations generally. For example, courts have frequently allowed section 1981 actions against retail stores by non-employee shoppers for alleged discriminatory treatment, *see, e.g.*, *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 873-80 (6th Cir. 2001), and against restaurants by non-employee patrons, *see, e.g.*, *Laroche v. Denny's Inc.*, 62 F. Supp. 2d 1375, 1385 (S.D. Fla. 1999); *McCaleb v. Pizza Hut of Am., Inc.*, 28 F. Supp. 2d 1043, 1050 (N.D. Ill. 1998); *Bobbitt v. Rage Inc.*, 19 F. Supp. 2d 512, 518-21 (W.D.N.C. 1998). Such cases have permitted

liability merely on the basis of the performance or formation of contractual relationships in a racially "disturbing atmosphere." *McCaleb*, 28 F. Supp. 2d at 1048. Under such case law, Tamko has exposure to potential liability for the racial harassment of Mr. Williams in the conduct of the Cummings/Tamko contractual relationship, and rejection of Tamko's authority to discharge Mr. Campbell for engaging in such harassment flies in the face of Tamko's obligation to comply with section 1981.

The Eleventh Circuit's approval of this arbitral award also conflicts with the principles of federal common law that govern this dispute under the CBA, and that are incorporated into positive statutory law by section 301 of the LMRA. "Plainly, national labor policy embodies the principles of non-discrimination as a matter of highest priority, and it is a commonplace that [the Court] must construe [a federal labor statute] in light of the broad national labor policy of which it is a part." *Emporium Capwell Co. v. W. Addition Cmty. Org., NLRB*, 420 U.S. 50, 66 (1975) (citation omitted); *accord Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 203 (1944) (emphasizing that, under the Railway Labor Act, "discriminations based on race alone are obviously irrelevant and invidious"). Both the court of appeals and the district court in this case in fact acknowledged that the elimination of racial discrimination in the workplace is a vital public policy, also embodied in Title VII and section 1981. Contrary to the Eleventh Circuit's judgment, however, the common lawmaking power that federal courts exercise under the LMRA, *see, e.g., Textile Workers of Am.*, 353 U.S. at 456, plainly authorizes courts to decline to enforce awards that thwart these fundamental federal policies against discrimination in the workplace by reinstating racial harassers without any discipline at all for their misconduct; the parties to a collective bargaining agreement may simply not agree — as *Eastern Associated Coal* requires the Court to assume from the arbitrator's award — to allow racial harassment of non-employees

to go unpunished. As the National Labor Relations Board has stated, "no court has permitted the existence of a collective-bargaining agreement or practices under or outside such agreements to stay its hand in ordering an employer or union to eliminate racial discrimination." *Laborers' Int'l Union of N. Am., AFL-CIO, Local 478*, 204 NLRB 357, 359 (1973). *Cf. Handy Andy, Inc.*, 228 NLRB 447, 456 (1977) ("[T]he [National Labor Relations] Board has long recognized its obligation to consider issues concerning discrimination on the basis of race, sex, national origin, or other unlawful, invidious, or irrelevant reasons when they are raised in an appropriate context, and we shall continue to do so.").

Indeed, the arbitrator's finding that Mr. Campbell's racially harassing conduct was entirely permissible under the applicable harassment policy amounts to a facial violation of the public policy requiring Tamko to "carry[] out its legal duty to eliminate [racial] harassment in the work place." *Newsday, Inc.*, 915 F.2d at 845. The award assumes a total deprivation of Tamko's ability to carry out its obligations with respect to the broad class of racially harassing employee behavior directed toward non-employees; yet Tamko has a legal duty to address *all* instances of racially harassing behavior in the workplace. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); 29 C.F.R. § 1604.11 (establishing employer obligation to prevent and remedy harassment). As discussed above, even the courts that have found no public policy violation in awards reinstating harassers have expressly relied on the fact that lesser penalties remained in force under the applicable arbitration award. *See, e.g., Westvaco Corp.*, 171 F.3d at 977 (noting that "a nine-month suspension without pay" was adequate to allow the employer to satisfy its duty to "exercis[e] reasonable care to promptly correct harassing behavior"); *Chyrsler Motors Corp.*, 959 F.2d at 689 (concluding that "a 30-day suspension rather than discharge was an adequate sanction"); *Communication Workers of Am.*, 882 F.2d at 469 (finding that

the reduction to a one month suspension without pay "fully incorporated th[e] important concern" in preventing sexual harassment in the workplace). Here, the arbitration award includes no penalties or conditions; and the Eleventh Circuit ultimately refused to opine whether any such additional penalties or conditions had to be or could be imposed. Pet. App. 4a. As it stands, therefore, the arbitration award leaves racial harassment of non-employees totally unpunished, and thus wholly frustrates the objectives of the federal anti-discrimination laws.

The Eleventh Circuit's citations to *Eastern Associated Coal Corp.* do not support a contrary conclusion. The Court in that case engaged in an issue-specific inquiry into the statutory and regulatory regime in which the asserted public policy (against the use of illegal drugs in the workplace) was grounded. *See* 531 U.S. at 63-67. There, unlike here, there was no violation of positive law. *See id.* at 63. Moreover, that case involved a highly detailed regulatory scheme that balanced competing concerns, such as the goal of rehabilitation of illegal drug users. *See id.* at 64-65. By contrast, the statutes at issue here, Title VII and section 1981, are much more general mandates that implement a national public policy of the highest order and leave far more room for judicial interpretation and explication; indeed, under this Court's cases, section 301 of the LMRA requires such "common lawmaking" explication. Furthermore, in contrast to the regulatory scheme at issue in *Eastern Associated Coal*, here there is no relevant competing interest that can compete with the policy against racial harassment in the workplace. In short, to the extent that it is relevant at all, *Eastern Associated Coal Corp.* reinforces Tamko's argument that the dominant and express public policy against race discrimination in the workplace precludes the award at issue here, which did not merely reinstate an employee with reduced discipline and conditions, but rather reinstated the employee with no discipline and no conditions.

The Eleventh Circuit's failed attempt to address this last defect in the arbitral award in fact involved a shell game of shifting premises. The Eleventh Circuit initially asserted that "nothing in the award is inconsistent" with the requirement of "voluntar[y] compliance with Title VII" because the award does not "*itself* preclude Tamko from imposing some form of discipline on Campbell other than discharge." Pet. App. 3a (emphasis added). But when, later in the opinion, the Eleventh Circuit addresses the propriety of any such alternative forms of discipline, the court inconsistently acknowledged that it was in fact "express[ing] no opinion" whether the collective bargaining agreement would allow such alternative discipline, much less whether public policy required it. Pet. App. 4a. Indeed, in suggesting that alternative discipline may be possible, the court of appeals appears to have ignored both the arbitration award's clear holding that Mr. Campbell's conduct simply did not violate Tamko's anti-harassment policy and the collective bargaining agreement's bar on the arbitrator (or anyone else) reviewing management's determination of the proper punishment. Pet. App. 41a, 43a-44a. In any event, the discussion in no way alters the court's holding that an arbitration award (and thus, by hypothesis, a collective bargaining agreement) may require reinstatement of a racial harasser without itself imposing any sanction whatsoever. So understood, the arbitration award plainly precludes Tamko from "exercis[ing] reasonable care to prevent and correct promptly any [racially] harassing behavior." *Burlington Indus.*, 524 U.S. at 765.

There are substantial arguments that the public policy against racial discrimination in the workplace is so important that an employer's decision to discharge a harasser may not be disturbed by an arbitrator without violating that public policy regardless whether a lesser punishment remains in effect. Two circuits have effectively so held. *See Stroehmann Bakeries, Inc.*, 969 F.2d at 1442; *Newsday, Inc.*, 915 F.2d at 843-45. But at the very least,

the authorities (other than the decision below) are unanimous in requiring that the imposition of some discipline, even if less severe than discharge, is necessary to satisfy the requirements of public policy, and that an arbitral award cannot simply reinstate a harasser with no penalty at all. *See Westvaco Corp.*, 171 F.3d at 977; *Chrysler Motors Corp.*, 959 F.2d at 689; *Communication Workers of Am.*, 882 F.2d at 469; *see also* Sarles, 17 Harv. Women's L.J. at 48-49 (noting that the imposition of alternative discipline "would be a sign that an arbitrator is at least cognizant of the multiple interests affected by the award"); Baker, 61 U. Cin. L. Rev. at 1389 (arguing that judicial deference to an arbitral award is appropriate "when an arbitrator reinstates with a lesser punishment"). The Eleventh Circuit stands alone in approving an award that reinstates a harasser with no alternative discipline.

The decision below is plainly wrong. It threatens to reduce the public policy doctrine to the enforcement of labor arbitrators' awards to a practical nullity. The decision ignores this Court's statements about the breadth of the public policy doctrine, misunderstands the requirements of positive law, neglects the federal courts' common lawmaking obligation under the LMRA, disregards the CBA itself, and entirely fails to address the basis for the arbitral award. Indeed, it ignores the long-standing judicial practice of refusing to enforce contracts that condone racial discrimination. To allow such a decision to stand would substantially undermine the important public policies against race discrimination at issue in this case, and improperly weaken the public policy doctrine generally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15168-DD

D.C. Docket No. 98-02534-CV-C-W

TAMKO ROOFING PRODUCTS, INC., Plaintiff-Counter-defendant-Appellee,

versus

LOCAL 10711 UNITED STEELWORKERS OF AMERICA, Defendant-Counter-claimant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

Before: CARNES and MARCUS, Circuit Judges, and PROPST*, District Judge.

(July 3, 2001)

* Honorable Robert P. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

United Steelworkers of America ("Union") appeals the district court's grant of summary judgment in favor of Tamko Roofing Products, Inc., refusing to enforce an arbitral award. [R 12] The

award ordered that Bobby Campbell, a former employee of Tamko who was discharged for making a racially offensive comment to an employee of another company while Campbell was at work, be reinstated to his previous position with backpay. [R 12:8]

One of the exceptions to the rule that courts defer to the judgment of labor arbitrators, *see Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36, 108, S. Ct. 364, 370 (1987), is the well-established principle that an arbitral award which is contrary to public policy is unenforceable, *see W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183 (1983). In *Eastern Associated Coal Corp. v. United Mine Workers of America*, ___ U.S. ___, 121 S. Ct. 462 (2000, the Supreme Court explained:

> In considering this [public policy exception] claim . . . we must treat the arbitrator's award as if it represented an agreement between [the parties] as to the proper meaning of the contract[]. . . . [T]he question to be answered is . . . does the contractual agreement to reinstate [the grievant] with the specified conditions run contrary to an explicit, well-defined, and dominant policy, as ascertained by reference to positive law and not from general considerations of supposed public interest?

121 S. Ct. at 466-67 (citations omitted). We note that the *Eastern* decision was not available to the district court at the time it decided this case.

The district court refused to enforce the arbitral award because it determined that Campbell's work-related conduct violated the public policy that prohibits racial harassment in the workplace. [R 12: 15-17] However, as the Supreme Court explained in *Eastern*, "the question to be answered is not whether [the grievant's conduct] itself violates public policy, but whether the

agreement to reinstate him does so." *Id.* at 467; *see Grace*, at 766, 103 S. C. at 2183. Applying *Eastern*, the issue in this case is whether the arbitral award, which ordered that Campbell be reinstated to his previous position with backpay, is contrary to an explicit, well-defined, and dominant public policy. We hold that it is not.

Tamko contends that the award is contrary to the public policy in Title VII against racial harassment in the workplace. *See* 42 U.S.C. §§ 1981 & 2000e; *Newsday, Inc. v. Long Island Typo. Union*, 915 F.2d 840, 844 (2d Cir. 1990). According to Tamko, that public policy requires employers to voluntarily comply with Title VII by exercising reasonable care to prevent and correct promptly any harassing behavior. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2293 (1998); *Grace*, at 770-71, 103 S. Ct. at 2186; 29 C.F.R. § 1604(11)(d). [Red. Br. 22-26]

But nothing in the award is inconsistent with such a policy. The award simply orders Tamko to reinstate Campbell with backpay. It does not condone his harassing behavior, nor does the arbitral award itself preclude Tamko from imposing some form of discipline on Campbell other than discharge. Reinstating with backpay, i.e., not discharging, an employee who made the single racially insensitive remark that Campbell did does not violate any provision of Title VII, or of any other law, including decisional law, or any regulation. Therefore, we concluded that the award does not run contrary to an explicit, well-defined, and dominant public policy. *See Eastern*, 121 S. Ct. at 468-69 (award does not violate public policy because reinstatement with specified conditions "violates no specific provision of any law or regulation"); *Int'l Broth. of Elec. Workers v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 131 (2d Cir. 1999) (upholding arbitral award to reinstate employee with back pay because no clear and unequivocal public policy precluded reinstatement); *Stead Motors*

v. Auto Machinists, 886 F.2d 1200, 1212 (9th Cir. 1989) (en banc) ("If a court relies on a public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars reinstatement.") (emphasis in original).

Tamko may decide that Campbell's harassing conduct should not go unaddressed and, upon reinstating him, may chose to impose some form of discipline other than discharge (which is precluded by the arbitral award). If Campbell and the Union believe that a new discipline imposed by Tamko is inconsistent with the terms of the collective bargaining agreement, then he is free to file a grievance, and eventually pursue his claim to arbitration. We recognize that it is conceivable that the validity of the result in any future arbitration could end up in court, but it may not.[1] In any event, we express no opinion here as to the validity under the collective bargaining agreement, or under public policy, of any disciplinary action – short of discharge, which is precluded by the arbitral award – that Tamko may chose to take regarding Campbell.

Because the arbitral award in this case is not contrary to any explicit, well-defined, and dominant public policy, we uphold the arbitrator's decision to reinstate Campbell with back pay.[2]

REVERSED

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[1] We remind the parties that public policy does not prohibit them from working out amicably any remaining disagreements they may have.

[2] Tamko also contends that the award should be set aside because "it is arbitrary and capricious, is without any rational basis, and constitutes a dispensing of the arbitrator's own brand of industrial justice." [Red Br. 41-49] It is clear to us that contention lacks merit, because the arbitrator was "arguably construing" the Prevention of Harassment Policy, which was at best ambiguous. *See Misco*, at 36, 108 S. Ct. at 370.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

TAMKO ROOFING PRODUCTS, INC.,

Plaintiff,

vs.

UNITED STEEL WORKERS OF AMERICA,
LOCAL 10711.

Defendant.

CIVIL ACTION NO. 98-C-2534-W

Filed Aug. 31, 2000

MEMORANDUM OPINION GRANTING THE PLAINTIFFS MOTION FOR SUMMARY JUDGMENT

In this case, the parties have filed cross-motions for summary judgment Plaintiff TAMKO Roofing Products, Inc. ("TAMKO") seeks to vacate an arbitrator's award, Defendant United Steelworkers of America, Local 1071L ("the Union") seeks to enforce it. Solely based on public policy considerations, the Court concludes that it should not be enforced.

I. The Undisputed Facts[1]

1. TAMCO is a manufacturer and distributor of commercial and residential roofing products. The Company owns and operates several manufacturing plants, including a plant in Tuscaloosa, Alabama. The Tuscaloosa plant employs approximately 180 hourly-paid production, maintenance, shipping and receiving employees represented by United Steelworkers of America, Local 1071L. About 25% of the work force employed at the Tuscaloosa plant is African-American.

2. Bobby Campbell, a white employee of TAMCO, was a lead man in the TAMCO's Tuscaloosa plant's Shipping Department. Campbell was discharged by the Company on October 30, 1997, for violating the Company's business conduct policy, which incorporates a prevention of workplace harassment. Campbell was a long service employee of the Company at the Tuscaloosa plant, having been first employed in 1979.

3. On October 27, 1997, at approximately 6:00A.M., Nathaniel Williams, an African-American employed by Cummings Truck Line as a truck spotter, was standing outside the Tuscaloosa plant's shipping office located in the vicinity of the plant's shipping dock.

4. Williams was assigned by his employer Cummings on a full-time daily basis to spot Cummings trailers at the TAMCO's Tuscaloosa plant's shipping dock. Williams had held this job assignment for about three years.

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[1] Mindful that "[t]he parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them" the court relies principally on the factual findings of the arbitrator, hereinafter referred to as the Arbitrator's Award ("AA"). *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 108 S. Ct. 364 (1987)("*Misco*").

5. As a truck spotter, one of Williams' functions is to communicate to TAMCO Shipping Department personnel the trailer numbers of the Cummings trailers which Williams has spotted in TAMKO's truck bays and the order numbers for each of the Cummings trailers which Williams has spotted. Williams communicates such information periodically during the course of each work day to a TAMKO shipping lead man stationed in the shipping office.

6. On October 27, two Shipping Department lead men were employed at the Tuscaloosa plant, Campbell and Andy Miles, another white employee. At 6:00 A.M. on that day, both Campbell and Miles were seated inside the shipping office. Campbell was seated next to a sliding glass window which is opened by the lead man whenever a truck spotter, truck driver, or other person needs to communicate with the lead man inside the office Campbell's desk is at a right angle to the sliding glass window and the desk occupied by miles faces directly toward the sliding glass window. At 6:00 A.M. Williams was standing outside the shipping office waiting for Campbell to open the window so that Williams could communicate to Campbell the trailer numbers of the trailers he had spotted that morning and the order numbers for each trailer.

7. Campbell did not notice Williams standing outside waiting for Campbell to open the window. After Williams had been waiting for several minutes, Miles, who could see Williams through the office window, said to Campbell, "Nate's standing at the window." Campbell then opened the window and, according to his testimony, said to Williams: "Hey, man, I'm sorry, I didn't see you. There's not enough light. Maybe you need to paint your face white." Williams maintains that Campbell said, "You ought to paint your face white so I can see you better." Miles, the only other person who was present when Campbell opened the window and spoke to Williams, testified that Campbell's statement to Williams

was: "Man, you need to put some white shoe polish or something on your face. I didn't see you standing there."

8. Williams contends that Campbell's statement to him hurt him and caused him to be both distraught and angry. Williams was still "angry" when he talked to Miles a short time later. Miles told Williams that he had overheard Campbell's statement to Williams and suggested to Williams that he report the occurrence to a Shipping Department Supervisor, Ron Mitchell. Williams did so the same morning. Mitchell then interviewed both Williams and Campbell some time around 10:00 A.M. on that day and reported the occurrence to the Shipping Department Manager, Mike White, and to the Tuscaloosa plant General Manager, Tom Deloughery.

9. General Manager Deloughery, after receiving the report from White and Mitchell, conducted an investigation of the matter. Deloughery first interviewed Williams, and concluded that Campbell's statement to Williams had "embarrassed [Williams] and had made him feel bad and it hurt him."

10. Following his interview of Williams, Deloughery interviewed Campbell. Campbell admitted "No, I told him he should put white shoe polish on his face so I could see him better, but I didn't mean anything by it, I was only kidding."

11. Based upon his investigation of the occurrence, Deloughery determined that Campbell had made one of two statements to Williams on the morning of October 27. Campbell had either said to Williams, "You should paint your face white" or "You should put white shoe polish on your face." Deloughery concluded, that, whichever of the two statements Campbell had made to Williams, the statement was racially demeaning and offensive.

12. Less than two weeks before October 27, Campbell had attended a sensitivity training workshop conducted by TAMKO, focusing on racial and sexual harassment in the workplace. The

workshop, which was conducted on a department-by-department basis, was attended by all employees at the Tuscaloosa plant, including Bargaining Unit employees, non-unit employees, supervisors and managers. The Company conducted the workshop because of allegations of a racially hostile work environment at the Tuscaloosa plant which was asserted in a race discrimination lawsuit brought against the company by a former African-American employee. In September 1997, the Company's legal counsel had investigated the allegations and, as a result of that investigation, recommended sensitivity training be conducted at the Tuscaloosa plant regarding racial and sexual harassment.

13. Campbell, along with other Shipping Department employees, attended the sensitivity training workshop held on October 15, 1997. Miles also attended the workshop. The workshop was conducted by the plant's Human Resources Manager, Dwight Wood. Wood, among other things, told the workshop attendees, including Campbell, that racial jokes and racial comments at the plant would not be tolerated by the Company, and that TAMKO had "zero tolerance" for such conduct. Wood also told the workshop attendees, including Campbell, that "Tamko would not tolerate any type of racial comments or racial slurs and that any violation of this policy would be dealt with severely up to and including termination."

15. On October 29, Dougherty advised Campbell that he was suspended pending further investigation. Dougherty advised Campbell and the Union's Shop Steward that Campbell would likely be discharged.

16. The decision to discharge Campbell was made by Deloughery after consultation with the Company's Vice President of Manufacturing, Tom King, and the company's in-house attorney, Bob Bradley. Recognizing that Campbell was a long service employee and that he had no prior disciplinary record,

Deloughery, King and Bradley discussed and considered the possibility of imposing a lesser penalty than discharge for Campbell's conduct on October 27. All three concurred, however, that Campbell should be discharged. Deloughery explained the basis of the decision:

> "Several reasons, the first and foremost is the seriousness of the offense. We have a situation where Mr. Campbell directly confronted a black person and humiliated him based on his race, and in talking with Nate (Williams) I could see that he was hurt, he was upset, he wanted to know – he asked me what I have done to cause this. As far as I could see, he hadn't done anything to cause it. And he didn't understand why people would humiliate him like that and treat him like that, that is, why Bobby treated him like that. I felt it was a very serious offense. It had resulted in serious harm to a human being. Second reason is we had just finished the training. I mean training wasn't two weeks old and already we had a situation where somebody had disregarded the training that we had offered. And in the training we had told the people, we had put them on notice, this is not going to be tolerated. If you do it, you're going to be severely disciplined, and within two weeks it happened. And the third reason is I felt that if I didn't take strong actions that I would be undermining the policy that Tamko has, the fact that if I didn't do something very strong that I would be condoning that type of activity in the plant."

17. Deloughery notified Campbell on October 30, 1997, that he was discharged from the Company's employment. The Union grieved the discharge pursuant to the Grievance-Arbitration procedures of the Union Agreement. The grievance was denied by the Company and the Union.

18. The collective bargaining agreement between TAMKO and the Union provides, in relevant part,

> "Art. V, Sec. 5. Limitations on Power of the Arbitrator, Discharge and Disciplinary Cases. In discharge or discipline cases, the arbitrator's authority and function shall be limited to answering the following questions: (1) whether the conduct or actions of the grievant which led to the discharge or discipline did, in fact, occur and, if so (2) whether such conduct or actions by the grievant justified disciplinary action by the Company. If the arbitrator answers both of the foregoing questions in the affirmative, he shall deny the grievance and sustain the discharge or other discipline imposed by the Company. The arbitrator shall have no authority in discharge or disciplinary cases to substitute his judgment for that of the Company in respect to the appropriate degree of discipline."

19. Following the arbitration hearing, the Arbitrator sustained Campbell's grievance and ordered him reinstated, with backpay.

20. The arbitrator found that Campbell had not violated TAMKO's Workplace Harassment Policy, which provides in relevant part.

> "No employee of TAMKO should harass others, be they co-workers, subordinates or supervisors. Harassment can interfere with any employee's work, make the working environment offensive and destroy teamwork. It is TAMKO's policy that no form of harassment should be present in the workplace."

In reaching his conclusion, the Arbitrator reasoned that

> If the Company had wished to prohibit harassment not only of co-workers, subordinators or supervisors, it should have provided that its Prevention of Harassment Policy wold also

> apply to other individuals as employees of the Company's customers or as individuals who were on the Company's premises with the Company's permission. . . . It would not be equitable in this Arbitrator's opinion to stretch the wording which is the Company's wording in its Prevention of Harassment Policy to cover the harassment of people not co-workers, subordinates, or supervisors.

Arbitrator's Award, pp. 14-15. The basis of the Arbitrator's award was that the Company had charged Campbell with "an offensive which could only arise in harassment of a co-worker of [Campbell]." *Id.* at p. 16.

II. Applicable Legal Standards

Since the *Steelworkers Trilogy, United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567, 80 S. Ct. 1343 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347; *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593 (1960), the primacy of arbitration awards in the context of labor disputes has been settled:

> [t]he question of the interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for, and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599, 80 S. Ct. 1358, 1362 (1960). Unless the award is merely the arbitrator's "own brand of industrial justice" or does not "dra[w] its essence form the collective bargaining agreement," a court is generally bound to enforce the award; it may

not second-guess the decision. *Id.*, at 597, 80 S. Ct. at 1361. It is irrelevant that the basis of the decision is ambiguous, that the arbitrator misread the contract, that the decision may appear to be incorrect, or that the decision is wrong. The courts generally "have no business weighing the merits" of the arbitration award. *Steelworkers v. American Mfg.*, 363 U.S. at 567-68, S. C. at 1346.

Eleventh Circuit jurisprudence requires that the party seeking to vacate an arbitration "refute every reasonable basis upon which the arbitrator may have acted." *Osram Sylvania, Inc. v. Teamsters Local Union*, 87 F.3d 1261, 1264 (11th Cir. 1996).

There is a narrow exception to the general judicial enforcibility of arbitration awards an arbitration award that contravenes public policy is unenforceable. *W. R. Grace & Co. v. Local Union 759, International Union of United Rubber*, 461 U.S. 757, 103, S. Ct. 2177 (1983), *Professional Administrators Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 643 (6th Cir. 1987). The Supreme Court has described the public policy doctrine as follows.

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interest in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreement.

Misco, 484 U.S. at 42.[2] (citations omitted).

The issue of whether an award violates "public policy" is to be determined judicially. *Id.*, at 43 (citing *W.R. Grace*, 461 U.S. at 766, 103 S. Ct. at 2183, *Professional Administrators*, 819 F.2d at 644. But, a court may refuse to enforce and arbitral award only in limited situations where the award would violate some explicit, well-defined and dominant public policy. Public policy may not be discerned from "general consideration of supposed public interests," but rather by reference to specific laws and legal precedents. *Misco*, 484 U.S. at 43, 80 S. Ct. at 373, *citing W.R. Grace*, 461 U.S. at 766, 103 S. Ct. at 2183.

In the seminal case *Delta Air Lines Inc. v. Air Lines Pilots Assoc., Int'l.*, 861 F.2d 665 (11th Cir. 1988), the Eleventh Circuit enunciated the standard for determining whether the rare public policy exception will bar the judicial non-enforcement of an arbitration award. That case involved an arbitration award which reinstated a pilot discharged for having flown while drunk a passenger-filled Boeing-727 from Boston to Bangor, Maine.[3] The district court had refused to enforce the award on public policy grounds. Reversing the district court, the circuit held that the public

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[2] In Misco, the Supreme Court overturned the Fifth Circuit's declination to enforce an arbitration award reinstating a discharged employee who had violated the company's drug policy.

[3] A few months before the *Delta Airlines* case was decided, the circuit had dealt with a similar issue – one in which an arbitrator's award reinstated an employee in whose car cocaine and drug paraphernalia were found when he was arrested, off company time, for driving while intoxicated. The employee was discharged for violating the company's drug policy, albeit that the drug charges had been dismissed as part of a plea bargain. Relying on *Misco*, the circuit held that "the district court exceeded its limited authority to review arbitration awards," and reversed the district court's failure to enforce the award. *Florida Power Corp. v. International Broth. Of Elec. Wkrs.*, 847 F.2d 680 (11th Cir. 1988).

policy exception may be invoked only in the rare situation where the offending conduct arises from the performance of employment duties. The availability of the exception turns on whether the wrongdoer "is the employee qua employee." The court distinguished *Misco* and *Florida Power*.

> The employee in Misco appears to have smoked marijuana in a car in the plant's parking lot. The employee in Florida Power was discovered to have drug paraphernalia in his automobile. In these cases, the apparent wrongdoing was serious and is seriously condemned. However, in deciding to commit the wrong, the wrongdoer was not making an employment decision. The employer, on the other hand, may reasonably have disliked furnishing employment to one who is committing such wrongs. Yet, should the employer decide to continue to employ such a wrongdoer, even though his actions are condemned by public policy, that decision – to continue employment – is not itself contrary to public policy. Furthermore, the wrongdoing by an employee can be ended without affecting his employment. The wrongdoing and the employment are parallel but not intertwined. The wrongful conduct is wrongful, in and of itself, and its lawfulness vel non does not depend in any way on the employment. If public policy is offended – as it seems to have been – the performance of employment duties has nothing to do with it.

861 F.2d at 670-71. The relevant inquiry, explained the court, is this. "Does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?"

The Eleventh Circuit's approach in *Delta Air Lines* has been rejected by two circuits, and followed by two others. The Ninth Circuit, *en banc*, concluded that

> the Eleventh Circuit's opinion in Delta is, to a large extent, simply inconsistent with the law was expressed in Grace and Misco. The Eleventh Circuit did not rely on the FAA's determination, alluding to it only in passing in a footnote, 861 F.2d at 668 n.3. Instead, the Delta court reasoned that, since what the pilot had done in flying drunk was illegal, the "performance of his employment [was] the very thing which offends public policy" and thus reinstatement was impermissible. 816 F.2d at 674. As we have explained, the critical inquiry is not whether the underlying act for which the employee was disciplined violates public policy, but whether there is a public policy barring reinstatement of an individual who has committed a wrongful act. [Citing *Grace* and *Misco*].

Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1215 (9th Cir. 1989). *Accord, Interstate Brands v. Chauffeurs, Teamsters, Local Union 135*, 909 F.2d 885 (6th Cir. 1990).

Two circuits have held outright that the prevention of sexual harassment is sufficient to invoke the public policy exception to the general rule that courts should not set aside arbitration awards which draw their essence from the contract. *In Newsday v. Long Island Typographical Union, No. 415, CWA, AFL-CIO*, 915 F.2d 840 (2nd Cir. 1990), a grievant had been reinstated by an arbitration award after having been discharged for sexually harassing female co-workers. The Second Circuit affirmed the district court vacatur of the arbitration award after reviewing the federal statutes and regulations, and case law, concluding that "there is an explicit, well-defined, and dominant public policy

against sexual harassment in the work place[,]" and that the arbitration award "prevents Newsday from carrying out its legal duty to eliminate sexual harassment in the work place." *Id.* at 845. The Third Circuit dealt with the same issue in *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bro. of Teamsters*, 969 F.2d 1436 (3rd Cir. 1992), holding that an arbitrator's award reinstating an employee accused of sexual harassment without a determination on the merits of the allegation "violates well-established and dominant public policies concerning sexual harassment in the workplace." *Id.* at 1438. It reasoned

> [A]n award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy. Therefore, [the arbitrator] construed the Agreement between the parties in a manner that conflicts with the well-defined and dominant policy concerning sexual harassment in the workplace and its prevention. His award would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred. Certainly, it does not discourage sexual harassment. Instead, it undermines the employer's ability to fulfil its obligation to prevent and sanction sexual harassment in the workplace.

Id. at 1442.[4]

The Fourth and Tenth Circuits have held that the general public policy against sexual harassment is not sufficient to supplant labor

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[4] There was a vigorous dissent by Judge Becker, but he did not quarrel with the proposition that "a public policy against sexual harassment in the workplace can readily be derived from the federal statutes and regulations as well as from judicial decisions," and that "if the public policy against sexual harassment were offended by this arbitrator's decision, the award could not stand." *Id.* at 1450.

arbitration of employee disciplinary sanctions. *Communications Workers of Am. v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989), *Westvaco Corp. v. United Paperworkers Int'l Union*, 171 F.3d 971 (4th Cir. 1999).

In *Chrysler Motor Corp. v. International Union*, 959 F.2d 685 (7th Cir. 1992), the Seventh Circuit noted the "well-organized" public policy against sexual harassment in the workplace arising from federal statutes and case law. *Id.* at 687-88. But it declined to invoke the public policy exception to set aside the arbitrator's reinstatement award, deferring instead to the arbitrator's judgment that a 30-day suspension rather than discharge would be "adequate to deter [the grievant] from further misconduct and to demonstrate to all employees Chrysler's opposition to sexual harassment." *Id.* at 686.[5] Notably, the arbitrator possessed the contractual authority to determine what constitutes "good cause" for discharge.

Whatever the law in other circuits, this court is bound by the law of the Eleventh Circuit. And in this circuit, the public policy exception to the judicial enforcement of arbitration awards has two elements: 1) law and legal precedents establishing a well-defined and dominant public policy, and 2) violation of the public policy by an employee while performing his duties as an employee. Unless these elements are satisfied, the arbitral award must be enforced.

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[5] The *Chrysler* court noted *Delta Airlines* but distinguished it on the basis that the grievant was not performing the integral duties of his position as a forklift operator when he sexually assaulted his female co-worker. *Id.*, n.3 at p. 689.

III. Analysis

Racial harassment in the workplace violates 42 U.S.C. § 2000e (Title VII)'s ban prohibiting racial discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). The Equal Employment Opportunity Commission ("EEOC") has long recognized that harassment on the basis of race is an unlawful employment practice under Title VII. See 2 EEOC Compl. Man. § 615.7 (CCH). Harassment which is sufficiently severe or pervasive to alter the terms and conditions of an employee's employment and create an abusive working environment is generally condemned by Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-66, 106 S. Ct. 2399, 2404-05 (1986). Our circuit has repeatedly held that an employer violates Title VII "simply by creating or condoning an environment at the workplace which significantly and adversely affects (the psychological well-being of) an employee because of his race or ethnicity." *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358 (11th Cir. 1982), (citing *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982). *See also, Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1981).

Moreover, 42 U.S.C. § 1981, whose roots have grown and developed over the last one and a third century, and particularly in the last nine years, establishes a dominant national policy forbidding racial discrimination and harassment in the workplace. In *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989), a bitterly divided Supreme Court held that this venerable statute 42 U.S.C. did not cover racial harassment in the workplace. Two years later, the Congress overturned this niggard interpretation of § 1981 by enactment of The Civil Rights Restoration Act of 1991, which makes it clear that the statute cover "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship". 42 U.S.C. § 1981(b).

Certainly, freedom from a racially hostile work environment is a "benefit, term, and condition" of the employment relationship.

And the national policy is binding on unions as well as employees. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), (union violated both Section 1981 and Title VII where it chooses not to process racial grievance under the equal employment clause of the union contract with the aim of enhancing its probabilities of success on other issues), *Terrell v. U.S. Pipe & Foundry Co.*, 644 F.2d 1112, 1120 (5th Cir. Unit B 1981), *vacated on other grounds*, 456 U.S. 955 (1982), *Howard v. Int'l Moulders & Allied Wrkrs. Union, Local 100*, 779 F.2d 1546 (11th Cir. 1986); (unions have an affirmative duty to eliminate any form of racial discrimination).

Equally clear is that Bobby Campbell violated this public policy while performing his duties as an employee of TAMKO. It was in specific reference to Campbell and Williams' performance of their respective duties that Campbell made the racially offensive statement.

Based on these considerations, the arbitrator's award should not be enforced by this court.

By separate order TAMKO's motion for Summary Judgment will be granted The Union motion will be denied.

DONE this 31st day of August, 2000.

/s/
UNITED STATES DISTRICT
JUDGE U.W. CLEMON

29 U.S.C. § 185

UNITED STATES CODE
TITLE 29. LABOR
CHAPTER 7--LABOR-MANAGEMENT RELATIONS
SUBCHAPTER IV--LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district

courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

42 U.S.C. § 1981

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER I--GENERALLY

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 2000e-2

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER VI--EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify,

or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its

administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or

other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was

a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

IN THE MATTER OF THE ARBITRATION BETWEEN

TAMKO ROOFING PRODUCTS, INC.,	) GRIEVANT: Bobby Campbell
AND	)
UNITED STEEL-WORKERS OF AMERICA, LOCAL 1071L	) PLACE: TUSCALOOSA, AL) DATE: 7/23/98

****

BEFORE: J. REESE JOHNSTON, JR.,

APPEARANCES: FOR THE COMPANY:

Allan L. Bioff
J. Randall Coffey
Bioff, Singer & Finucane
104 West 9th Street
Suite 400
Kansas City, MO 64105-1718

FOR THE UNION:
Billy McColeman
United Steelworkers of America
District 9
Suite 44 - Flintridge Building
6200 E. J. Oliver Boulevard
Fairfield, AL 35064

POST-HEARING
BRIEFS RECEIVED: August 29, 1998

BACKGROUND

Tamko Roofing Products, Inc., is a manufacturer and distributor of commercial and residential roofing products. The Company owns and operates several manufacturing plants, including a plant in Tuscaloosa, Alabama. The Tuscaloosa plant employs approximately 180 hourly-paid production, maintenance, shipping and receiving employees represented by United Steelworkers of America, Local 1071L. About 25% of the work force employed at the Tuscaloosa plant is African-American.

Bobby Campbell, the Grievant, was a lead man in the Tuscaloosa plant's Shipping Department, and was discharged by the Company on October 30, 1997, for violating the Company's business conduct policy, which incorporates a prevention of workplace harassment.. Grievant was a long service employee of the Company at the Tuscaloosa plant, having been first employed in 1979.

On October 27, 1997. at approximately 6:00 a.m., a truck spotter named Nathaniel Williams, who is employed by Cummings Truck Line, was standing outside the Tuscaloosa plants shipping office located in the vicinity of the plant's shipping dock.

Williams was assigned by his employer Cummings on a full-time, daily basis to spot Cummings trailers at the Tamko Tuscaloosa plant's shipping dock. Williams had held this job assignment for about three years. Williams is an African- American.

As a truck spotter, one of Williams' functions is to communicate to Tamko Shipping Department personnel the trailer numbers of the Cummings trailers which Williams has spotted in Tamko's truck bays and the order numbers for each of the Cummings trailers which Williams has spotted. Williams communicates such information periodically during the course of each work day to a Tamko shipping lead man stationed in the shipping office.

On October 27 two Shipping Department lead men were employed at the Tuscaloosa plant, the Grievant and Andy Miles both non-minorities. At 6:00 a.m. on October 27, both Grievant and Miles were seated inside the shipping office. Grievant was seated next to a sliding glass window which is opened by the lead man whenever a truck spotter, truck driver, or other person needs to communicate with the lead man inside the office. The Grievant's desk is at a right angle to the sliding glass window and the desk occupied by Miles faces directly toward the sliding glass window. At 6:00 a.m. Williams was standing outside the shipping office waiting for Grievant to open the window so that Williams could communicate to the Grievant the trailer numbers of the trailers he had spotted that morning and the order numbers for each trailer.

Grievant did not notice Williams standing outside waiting for Grievant to open the window. After Williams had been waiting several minutes, Miles, who could see Williams through the office window, said to the Grievant, "Nate's standing at the window." Grievant then opened the window and, according to his testimony, said to Williams: "Hey, man, I'm sorry, I didn't see you. There's not enough light. Maybe you need to paint your face white." Williams in his testimony testified that the Grievant said "You ought to paint your face white so I can see you better." Miles, the only other person who was present when Grievant opened the window and spoke to Williams. testified that Grievant's statement to Williams was: "Man, you need to put some white shoe polish or something on your face. I didn't see you standing there."

Williams alleged that the Grievant's statement to him hurt him and caused him to be both distraught and angry. Williams was still "angry" when he talked to Miles a short time later. Miles told Williams that he had overheard Grievant's statement to Williams and suggested to Williams that he report the occurrence to a Shipping Department Supervisor, Ron Mitchell. Williams did so the same morning. Mitchell then interviewed both Williams and the

Grievant some time around 10:00 a.m. on that day and reported the occurrence to the Shipping Department Manager, Mike White, and to the Tuscaloosa plant General Manager, Tom Deloughery.

General Manager Deloughery, after receiving the report from Department Manager White and Supervisor Mitchell, that Grievant had made a racially offensive statement to Williams. Deloughery conducted an investigation of the matter. Deloughery first interviewed Williams. This interview was conducted at about 10:30 a.m. on October 27. Deloughery asked Williams what had occurred early that morning with regard to the Grievant, Bobby Campbell. Williams responded that "Bobby Campbell hadn't seen him and that when Bobby opened the window Bobby said 'you should paint your face white so I can see you better.'" During the interview Deloughery observed that Williams was "very upset", and "agitated" by the statement that Grievant had made to him that morning. Deloughery concluded that Grievant's statement to Williams had "embarrassed him and had made him feel bad and it hurt him."

Following his interview of Williams, Deloughery interviewed Grievant that same morning. Deloughery told Grievant that Williams had reported to him that "you said to him that he should paint his face white so you could see hun better." Grievant responded, "No, I told him he should put white shoe polish on his face so I could see him better, but I didn't mean anything by it, I was only kidding."

Based upon his investigation of the occurrence, including his interview with Williams and Grievant, Deloughery determined that Grievant had made one of two statements to Williams on the morning of October 27. Grievant had either said to Williams, "You should paint your face white" or "You should put white shoe polish on your face". Deloughery concluded that, whichever of the two

statements Grievant had made to Williams. the statement was racially demeaning and offensive.

The next morning, October 28, Deloughery, in the presence of the Union Shop Steward, advised Grievant that he was suspended pending further investigation. Deloughery further advised Grievant and the Shop Steward that it was very probable that Grievant's employment with the Company would be terminated.

Less than two weeks before the date October 27 that Grievant made the racially derogatory remark to Williams, Grievant had attended a sensitivity training workshop conducted by the Company, focusing on racial and sexual harassment in the workplace. The workshop, which was conducted on a department-by-department basis, was attended by all employees at the Tuscaloosa plant, including Bargaining Unit employees, non-unit employees, supervisors and managers. The Company conducted the workshop because of allegations of a racially hostile work environment at the Tuscaloosa plant which was asserted in a race discrimination lawsuit brought against the Company by a former African-American employee. In September 1997 the Company's legal counsel had investigated the allegations and, as a result of that investigation, recommended that sensitivity training be conducted at the Tuscaloosa plant regarding racial and sexual harassment.

Grievant, along with other Shipping Department employees, attended the sensitivity training workshop held on October 15, 1997. Fellow lead man Miles also attended the same workshop. Each of the department workshops, including the one attended by Grievant and Miles, was conducted by the plant's Human Resource Manager, Dwight Wood. Wood, among other things, told the workshop attendees, including Grievant, that racial jokes and racial comments at the plant would not be tolerated by the Company, and that Tamko had "zero tolerance" for such conduct.

Wood also told the workshop attendees, including Grievant, that "Tamko would not tolerate any type of racial comments or racial slurs and that any violation of this policy would be dealt with severely up to and including termination".

The decision to discharge the Grievant was made by General Manager Deloughery after consultation with the Company's Vice President of Manufacturing, Tom King, and the Company's in-house attorney, Bob Bradley. Recognizing that Grievant was a long service employee and that he had no prior disciplinary record, Deloughery, King and Bradley discussed and considered the possibility of imposing a lesser penalty than discharge for Grievant's conduct on October 27. All three concurred, however, that Grievant should be discharged. Deloughery testified why he, King and Bradley arrived at that decision;

> "Several reasons, the first and foremost is the seriousness of the offense. We have a situation where Mr. Campbell directly confronted a black person and humiliated him based on his race, and in talking with Nate.(Williams) I could see that he was hurt, he was upset, he wanted to know — he asked me what I have done to cause this. As far as I could see, he hadn't done anything to cause it. And he didn't understand why people would humiliate him like that and treat him like that, that is, why Bobby treated him like that. I felt it was a very serious offense. It had resulted in serious harm to a human being."
>
> Second reason is we had just finished the training. I mean training wasn't two weeks old and already we had a situation where somebody had disregarded the training that we had offered. And in the training we had told the people, we had put them on notice, this is not going to be tolerated. If you do it, you're going to be severely disciplined, and within two weeks it happened. And the third reason is I felt that if I didn't take strong actions that I would be undermining the policy that

Tamko has, the fact that if I didn't do something very strong that I would be condoning that type of activity in the plant."

Deloughery notified the Grievant on October 30, 1997, that he was discharged from the Company's employment. The Union grieved the discharge pursuant to the Grievance-Arbitration procedures of the Union Agreement. The grievance was denied by the Company, was appealed by the Union to arbitration and is now before this Arbitrator for final solution.

APPLICABLE CONTRACT PROVISIONS

"ARTICLE VI
DISCHARGE AND SUSPENSION

"Employees shall not be discharged or suspended without just cause. The discharge or suspension shall be considered final unless the discharge or suspension is protested in writing to the General Manager within three working days after the discharge or suspension becomes effective. If so protested, the written protest will be deemed to be a grievance under the grievance-arbitration provisions of this Agreement provided, however, that such grievance will be taken up directly in the second step of the grievance procedure and the first step of the grievance procedure will automatically be deemed waived by the parties. Should the grievance be taken to arbitration, the limitations contained in Article V, Section 5 ('Limitations on Powers of the Arbitrator; Discharge and Disciplinary Cases') shall be applicable.

Should it be determined in the grievance-arbitration procedure that an employee discharged or suspended is entitled to back pay, any such back pay award shall be reduced by the amount of unemployment compensation benefits or compensation for personal services which the employee may have received during the period of separation (other than compensation for personal

services received by the discharged or suspended employee from a second job which the discharged or suspended employee held and was compensated for, for a period of not less than thirty days immediately prior to the beginning of his separation from the Company). Federal, state or local taxes, or dues and insurance premiums normally deducted from the employee's pay shall be withheld from any back pay award.

An employee suspended by the Company pending investigation to determine if discharge or other disciplinary action is justified, shall be notified by the Company not later than ten (10) calendar days following the first day of such suspension as to the conduct or actions of the employee which are under investigation. Failure to so notify the suspended employee shall not affect the Company's right to discharge or discipline the suspended employee for just cause.

An employee will be told when a written counseling report is to be placed in his personnel file and, upon the employee's request, will be provided a copy of the written counseling report.

When an employee is suspended or discharged, the Company will notify the Union of such action. Failure to give or delay in giving such notice shall not affect the propriety of the suspension or discharge."

"Art. V, Sec. 5. Limitations on Power of the Arbitrator; Discharge and Disciplinary Cases. In discharge or discipline cases, the arbitrator's authority and function shall be limited to answering the following questions: (1) whether the conduct or actions of the grievant which led to the discharge or discipline did, in fact, occur and, if so (2) whether such conduct or actions by the grievant justified disciplinary action by the Company. If the arbitrator answers both of the foregoing questions in the affirmative, he shall deny the grievance and sustain the discharge

or other discipline imposed by the Company. The arbitrator shall have no authority in discharge or disciplinary cases to substitute his judgment for that of the Company in respect to the appropriate degree of discipline.

Attached hereto and marked Exhibit "A" is the prevention of Harassment Policy of Tamko Roofing Products, Inc. This policy was amended as of January 1, 1997.

ISSUE

Did the Company have just cause to discharge the Grievant, Bobby Campbell? If not, what should the remedy be?

POSITION OF THE PARTIES

It is the position of the Company:

A. The conduct which led to the Grievant's discharge did in fact occur.

B. 1. Grievant's statement to Williams was racially offensive and violates the Company's policies, which prohibit all forms of workplace harassment, including the use of racially demeaning or offensive language.

2. All Tuscaloosa plant employees, including Grievant, were placed on clear notice shortly before Grievant's racial statement (i) that the Company would not tolerate the use of racially demeaning or offensive language in violation of the Company's policies prohibiting all forms of workplace harassment, including racial harassment; (ii) that violations of those policies would subject the violator to severe discipline.

3. The Company has an absolute legal obligation under Title VII of the Civil Rights Act of 1964 to prevent the use of racially demeaning or offensive language in the workplace and to prohibit a racially offensive work environment.

4. Court decisions and arbitral authority establish that Grievant's use of racially demeaning or offensive language in the workplace provides just cause for disciplining even though directed at a non-employee because such language pollutes the working environment of other employees in violation of Title VII.

5. Prior to the hearing, the Union conceded that Grievant's conduct justified disciplinary action by the Company.

C. 1. The Company and the Union have contractually agreed that the Arbitrator has no authority to modify the discharge penalty imposed by the Company.

2. The Union's contention that the Arbitrator has authority to modify the discharge penalty ignores the clear and unambiguous language of the Labor Agreement and seeks to obtain an arbitration that the Union was unable to obtain in Collective Bargaining.

3. The Arbitrator would not be warranted in modifying the discharge even in the absence of the limitations on his authority imposed by the contract in this case.

It is the Union's position:

1. That the alleged racial remark was nothing more than shop talk and as Campbell, the Grievant, stated, "I didn't mean anything by it. The Grievant and Williams had been friends for years.

2. That the contract provides that the Company has to have just cause to discharge an employee.

3. That the fact that Mr. Williams was not an employee of the Company and not being a Company employee, the policy of the Company would, under the law of Contracts, not have application in this case since Mr. Williams was in fact not a co-employee subordinate or superior to the Grievant, Bobby Campbell.

DISCUSSION

I have reviewed the transcript of the testimony of the witnesses, examined carefully the exhibits introduced into evidence by the parties, and I have read and studied the excellent post-hearing briefs filed by the representatives of the parties. I have also read and studied the 14 Federal Court cases and the 16 arbitral cases cited in support of said briefs. These post-hearing briefs were received on August 29, 1998.

A careful reading of the Company's Prevention of Harassment Policy shows that policy by its own specific terms prohibits harassment only to co-workers, subordinate or superior. It is conceded that Mr. Williams, the person allegedly harassed, was not an employee of the Company, but was in fact an employee of Cummings Truck Lines.

The Company promulgated its Prevention of Harassment Policy unilaterally. This Policy states in its introduction paragraph: "No employee of Tamko should harass others, be they co-workers, subordinates or supervisors." If the Company had wished to prohibit harassment not only of co-workers, subordinates or supervisors, it should have provided that its Prevention of Harassment Policy would also apply to other individuals as employees of the Company's customers or as individuals who were on the Company premises with the Company's permission. This the Company in adopting and amending its Business Policy and Prevention of Harassment Policy did not do.

It would not be equitable in this Arbitrator's opinion to stretch the wording which is the Company's wording in its Prevention of Harassment Policy to cover the harassment of people not co-workers, subordinates or supervisors. In the company's testimony Mr. Deloughery at page 109 of the transcript was asked: "What was the reason for Mr. Campbell's discharge from the employment of the Company?" His answer was "Violation of the Company's

Business Conduct Policy, specifically dealing with harassment and discrimination." Question; Workplace harassment policy? Answer; Yes.

It would not, as stated above, in this Arbitrator's opinion be equitable to permit the Company to change the reason for Mr. Campbell's discharge at this late date. Based on the above, it is my finding that the Workplace Harassment Policy specifically is limited to harassment between an employee and other employees, whether subordinates or supervisors. It is my finding that the word "co-worker" means another employee of the Company. Therefore, the Company has failed to prove a violation of the Workplace Harassment Policy because Mr. Williams was not an employee of Tamko, but was instead an employee of Cummings Truck Lines. In other words, the Company chose the reason for the discharge of Mr. Campbell and so testified, and that basis for his discharge cannot now be changed or added to by alleging that his action toward Mr. Williams was a violation of public policy, federal law, or any other thing other than a violation of the Workplace Harassment Policy.

The language of Article V, Section 5, hereinabove set out under Applicable Contract Provisions, provides a limitation on the Arbitrator's authority and function to answering the following questions: (1) Whether the conduct or actions of the Grievant which led to the discharge or discipline did, in fact, occur, and, if so, (2) whether such conduct or actions by the Grievant justified disciplinary action by the Company. If the Arbitrator answers both of the foregoing questions in the affirmative, he shall deny the grievance and sustain the discharge or other discipline imposed by the Company. As I have stated above, the Company charged the Grievant with an offense that can only arise in harassment of a co-worker of the Grievant. Therefore, the answer to questions (1) and (2), above, are both in the negative.

AWARD

The grievance of Bobby Campbell is sustained and the Company is directed to compensate him for all lost wages and other benefits and without a break in his seniority with the Company. The Company is to return Mr. Campbell to the position he occupied prior to his termination and his. back pay will be calculated based on the number of straight time hours and overtime hours that the employee who replaced him actually worked from the time Mr. Campbell ceased working to the date of his reinstatement. From this figure there should be deducted any compensation or payments received by Mr. Campbell from the Alabama Unemployment Compensation bureau, plus any compensation earned by Mr. Campbell at any other jobs he may have worked during the period of time he has been out of Tamko's employ. The amount of the back pay is subject, of course, to the usual payroll deductions. Since there could be a dispute as to the amount of back pay owed to Mr. Campbell, I will retain jurisdiction of this matter for thirty (30) days and if either party notifies me in writing with copy to the other party that the parties cannot mutually agree as to the correct amount of back wages, I will set that question down for hearing and determination of the correct amount of back pay.

DATE OF AWARD;
September 10, 1998

/s/

J. Reese Johnston, Jr.
Arbitrator
800 Shades Creek Parkway
Suite 325
Birmingham, AL 35209

GRIEVANCE HEARING
ON BOBBY CAMPBELL
JULY 23, 1998

10:45 A.M.

WHEREUPON the following proceedings were taken before Nancy Pannell, Commissioner and Notary Public, State of Alabama at Large, at the Hampton Inn, Cottondale, Alabama on the 23rd of July 1998.

* * *

Mr. Campbell and you told Deloughery and White and Mitchell that there had been earlier times when Mr. Campbell had made, had called you names before, did Mr. Deloughery ask you specifically what Mr. Campbell had said to you?

A. Yes, he did.

Q. And when Mr. Deloughery asked that question how did you respond, what did you say?

A. Well, I told him it was names like porch monkey, biscuit lip.

Q. Porch monkey and what was the next one?

A. Biscuit lips, gig-a-boo.

Q. Gig-a-boo.

A. And I told them that I don't know why this started the way that it did. I also told them that the peoples at the office that I work for they was aware of what was going on over here.

Q. You mean the people you worked for at Cummings Truck Line?

* * *

you told them about these names that Mr. Campbell had called you in the past—biscuit lips and gig-a-boo and so on, did Mr. Deloughery ask you how recently Mr. Campbell had used those words in talking to you?

A. Well, I told them that it would happen often like once every week or twice a week or just nearly every week.

Q. Did Mr. Deloughery ask you how long ago?

A. Yes.

Q. And what did you say to him?

A. I told them that it started eight months after I had been over there the first year.

Q. You mean eight months after what?

A. Eight months after I took the job of spotter on the dock the year that I started over there. I been there for three years and it's been going on for two years and some months.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15168-DD

TAMKO ROOFING PRODUCTS, INC.,
Plaintiff-
Counter-defendant-
Appellee.

versus

LOCAL 1071L UNITED STEELWORKERS OF AMERICA

Defendant-
Counter-claimant-
Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

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September 4, 2001

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, ____ F.2d _____)

Before: CARNES and MARCUS, Circuit Judges, and PROPST*, District Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

---

[1] Honorable Robert P. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.

MOTION FILED
JAN - 3 2001

No. 01-824

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

TAMKO ROOFING PRODUCTS, INC.,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
LOCAL 1071L,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* CENTER ON NATIONAL LABOR POLICY, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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Manufacturers

No. 01-824

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

TAMKO ROOFING PRODUCTS, INC,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
LOCAL 1071L,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* BY THE CENTER ON NATIONAL LABOR POLICY, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

The Center on National Labor Policy, Inc. and the National Association of Manufacturers respectfully move pursuant to this Court's Rule 37(b) for leave to file their brief *amici curiae* in support of the position of Petitioner Tamko Roofing Products, Inc. Consent was sought from all parties but was not granted by the Respondent. All of these documents have been filed with the Clerk.

The accompanying brief urges this Court to grant *certiorari* in order to consider the important adverse effects of the decision of the United States Court of Appeals in *Tamko*

Roofing Products, Inc. v. Local 1071L United Steelworkers of America, No. 00-15168-DD (11th Cir. 2001) (per curiam).

The Center on National Labor Policy, Inc. (the "Center") is a public interest legal foundation chartered to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public consumers, taxpayers, and workers. As this Court recognized in *Connell Constr. Co. , Inc. v. Steamfitters Local Union No. 100*, 421 U.S. 616, 625 (1975), union pressure "could result in significant adverse effects on the market and on consumers." When organized labor pressures are supported by a governmental policy permitting unremedied racial hostility in the workplace and repudiating an employer's attempt to eradicate racial discrimination in the workplace, as in the case at bar, significant questions are raised concerning the civil rights of other affected parties—the public, consumers, taxpayers, and workers.

The National Association of Manufacturers ("the NAM") is the nation's oldest and largest broad-based industrial trade association. It represents nearly 14,000 member companies and subsidiaries, including 10,000 small and mid-sized manufacturers, and 350 member associations serving manufacturers and employees in 50 states. NAM members produce goods in every industrial sector.

The NAM is concerned that the federal courts are enforcing local collective bargaining agreements which conflict with important federal policies that employers have an affirmative duty to comply with. The Court below exceeded its authority when it permitted an arbitrator to install his own upset the employer's prerogatives to impose its affirmative duty to apply federal law.

The *amici* believe that federal employment laws were designed to promote an atmosphere conducive to the exercise of productive and efficient methods of operation as well as promoting positive and civil employee work ethics. A federal policy permitting an arbitrator to impose conflicting obligations on employers in the circumstances of this case is of great concern to the *amicis'* members who will face repeated conflicting obligations and litigation as a result of the decision below.

Because the Center and the NAM can bring to this case a diverse perspective not presently represented, the *amici curiae* can assist the Court in obtaining full consideration of public interest issues.

Accordingly, the Center and the NAM respectfully

request leave to file the annexed brief *amici curiae*.

Respectfully submitted,

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No. 01-824

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

TAMKO ROOFING PRODUCTS, INC,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
LOCAL 1071L,
Respondent.

BRIEF OF THE CENTER ON NATIONAL LABOR POLICY, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTION

Pursuant to Supreme Court Rule 37.2(a), the Center on National Labor Policy, Inc. and the National Association of Manufacturers submit this joint brief as *amici curiae* in support of the Petitioner.[1]

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[1]Letters of consent and denial have been filed with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written or produced by any person
(continued...)

INTEREST OF *AMICI CURIAE*

The Center is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor organizations and governmental entities. The Center believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions.

The National Association of Manufacturers ("the NAM") is the nation's oldest and largest broad-based industrial trade association. It represents nearly 14,000 member companies and subsidiaries, including 10,000 small and mid-sized manufacturers, and 350 member associations serving manufacturers and employees in 50 states.

Further background and interests of *amici* have been detailed in the preceding motion for leave to file this brief.

The *amici* jointly believe that the legal issues under review herein are extremely important to employers throughout the nation. The Eleventh Circuit's decision here imposes an undue burden on employers subject to an

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[1](...continued)
or entity other than the *amici curiae* or its counsel.

array of federal employment laws, including the National Labor Relations Act (the "Act"), that threatens employer rights and obligations set forth by Congress in numerous federal statutes.

ISSUES

The *amici* hereby adopt and incorporate by reference the Petitioner's Questions Presented.

STATEMENT OF THE CASE

The *amici* hereby adopt and incorporate by reference the Petitioner's Statement of the Case.

In addition, *amici* wish to stress that under normal circumstances where an arbitrator reviews, under a collective bargaining agreement, a reasonable decision by an employer to terminate an employee for racially harassing someone on company premises, deference is normally given by the federal courts. As is usual in such cases, the arbitrator must decide whether the harassment in fact occurred and whether the harassment justified disciplinary action by the employer. If it did, the arbitrator, under the collective bargaining agreement in effect in this case, has "no authority to substitute his judgment for that of the Company in respect to the appropriate degree of discipline." Pet. App. 40a-41a.

In this case, however, the arbitrator ruled that the company's anti-harassment policy was not stated clearly enough to prohibit harassment of non-employees. Without

a clearly stated company policy, the arbitrator believed the employer could not terminate the harasser. The arbitrator then ordered the employee reinstated, finding that the company could not discipline an employee unless the company's anti-harassment policy mentions third-party harassment as an offense. The arbitrator ordered the employee reinstated, with full backpay and without according him any discipline for his racial epithets.

The district court judge overturned this ruling, finding that a well-defined and dominant public policy against racial harassment in the workplace prohibits a court from enforcing the reinstatement order. The United States Court of Appeals for the 11th Circuit reversed, prompting this appeal.

SUMMARY OF ARGUMENT

The Petition presents a circuit court conflict concerning an issue of great public importance. The Petitioner, Tamko Roofing Products, Inc., has presented this Court with a compelling set of arguments outlining (1) a split in the Circuits, (2) the importance and recurring nature of the issue on appeal, and (3) the misapplication of the "public policy doctrine" by the Court of Appeals to the arbitrator's decision. As demonstrated in the Petition, the federal courts have simply abandoned the practice of evaluating the *bona fides* of a arbitration decisions that refuse to acknowledge an employer's action in compliance

with the employer's federal duties. By erecting a rule that writes out consideration of these employer duties and responsibilities, the lower courts place employers in untenable situations.

This Court has long recognized that an arbitration award may be set aside on the grounds that it violates law or public policy. *United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 39, 43 (1987); W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757, 766 (1983).

Employers subject to statutory liability on account of an arbitration decision must be able to set the award aside in federal court on the basis of these federal policies. At the very least, the arbitrator should accommodate the federal policy when prescribing a remedy, rather than denouncing the employer's legitimate interest in protection from outside litigation. *See Eastern Assoc. Coal Corp. v. UMWA, District 17,* 531 U.S. 57, 121 S. Ct. 462, 469 (2000).

The chilling effect of the circuit decision is compounded when the policy is one of denouncing racial harassment. This Court, the Congress, and the people of the United States through the Constitution have established the most stringent examination for such cases. Moreover, the Eleventh Circuit's new policy departs from instructions given in the cases cited above.

Absent review by this Court, the *amici* are greatly concerned that the balance of labor relations will be undermined by the decision below. As representatives of thousands of employers nationwide, *amici* fully support the arguments of the Petitioner, and urge this Court to grant a writ of *certiorari* to review the lower court's decision.

REASONS FOR GRANTING THE PETITION

I.

ABSENT REVIEW BY THIS COURT, THE DECISION BELOW WILL THREATEN EMPLOYER RIGHTS AND OBLIGATIONS TO COMPLY WITH POSITIVE FEDERAL LAW OUTSIDE OF UNION CONTRACT SETTINGS.

A. Introduction.

The case at bar not only affects companies with collective bargaining agreements—it affects arbitration awards in non-union settings—as well. This Court's recent experience in several cases involving a review of agreements between employers and employees that call for arbitration to resolve employment-related disputes outside of collective bargaining and union contract situations illustrates the importance of federal policy promoted under the Federal Arbitration Act. 9 U.S.C. § 1 *et seq.* *See Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001), *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 1401 (2001).

The nation's employers for many years have been embracing various alternatives to formal grievance procedures and the ensuing expense of litigation engendered by collective bargaining agreements. In non-union workplaces, which comprise the vast majority of employers nationwide, *amici* believe that arbitration is becoming a more common form of dispute resolution. *Statistics in Employment Suits, United States Department of Justice* (Oct 9, 2000)

Judging by the number of cases that have already been litigated through the courts of appeals, and which tripled from 1990-98, *id*, *amici* expect that arbitral awards in the non-union context will also be subject to review in the courts. It is thus vitally important that this Court resolve the conflict between the circuits over the extent to which an arbitrator can overturn an employer's disciplinary decision involving attempts to comply with federal law.

B. This Case Involves More Than an Employer's Action to Root Out Racial Harassment.

This case affects companies trying to comply with anti-discrimination laws involving employment related actions. Employer discipline in the workplace can result from an increasing number of federal, state and local statutes, regulations, permits and orders. There are at least 67 significant federal labor and employment laws of

general applicability to employers, and more are under discussion in Congress every year.[2]

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[2]1998 - Consumer Credit Reporting Reform Act; 1997 - Federal Fair Credit Reporting Act; 1997 - Taxpayer Relief Act of 1997; 1997 - Balanced Budget Act of 1997 (Retirement Plans); 1996 - Newborns' and Mothers' Health Protection Act; 1996 - Mental Health Parity Act of 1996; 1996 - Illegal Immigration Reform and Immigrant Responsibility Act of 1996; 1996 - Health Insurance Portability and Accountability Act of 1996; 1996 - Small Business Job Protection Act of 1996(Pension Simplification); 1996 - Minimum Wage Increase Act of 1996; 1994 - Budget Reconciliation Act; 1994 - The Pension Annuitants Protection Act of 1994; 1994 - Bankruptcy Reform Act of 1994; 1994 - Uniformed Services Employment and Reemployment Rights Act; 1993 - Family and Medical Leave Act of 1993; 1993 - Omnibus Budget Reconciliation Act of 1993 (Tax Changes to Retirement Plans); 1992 - Coal Industry Retiree Health Benefit Act of 1992; 1992 - Unemployment Compensation Amendments of 1993 (20% Withholding & Rollover) 1991 - Civil Rights Act of 1991; 1990 - Older Workers Benefit Protection Act; 1990 - Americans With Disabilities Act of 1990 (ADA); 1989 - Whistleblower Protection Act of 1989; 1988 - Employee Polygraph Protection Act of 1988; 1988 - Drug-Free Workplace Act of 1988; 1988 - Worker Adjustment and Retraining Notification (WARN) Act; 1986 - Tax Reform Act of 1986 (105(h),401(a)(26),401(k),401(m),410(b),415; 1986 - Immigration Reform and Control Act (IRCA) of 1986; 1986 - Omnibus Budget Reconciliation Act (OBRA) of 1986; 1986 - Age Discrimination in Employment (ADEA) Amendments of 1986; 1985 - Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA); 1984 - Retirement Equity Act of 1984 (REACT); 1984 - Deficit Reduction Act of 1984 (DEFRA); 1982 - Job Training Partnership Act (JTPA) 1982 - Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) 1980 - Multiemployer Pension Plan Amendments Act of 1980 (MEPPA); 1980 - Guidelines on Sexual Harassment; 1978 - Uniform Guidelines on Employee Selection Procedures; 1978 - Pregnancy Discrimination Act (PDA); 1978 - Labor Management

(continued...)

Any employer, and particularly a small or medium-sized employer, that wishes to comply with and cooperate with government authorities in the enforcement of these and other laws would be hard-pressed to develop workplace policies that adequately address them all, much

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[2](...continued)
Cooperation Act of 1978; 1974 - Privacy Act of 1974; 1974 - Employee Retirement Income Security Act of 1974 (ERISA) and 404 (c) Regs.
1973 - Rehabilitation Act of 1973 (Amended 1974, 1976,1984, 1986, 1991, 1992, 1993); 1972 - Vietnam Era Veterans' Readjustment Assistance Act of 1972; 1971 - Fair Credit Reporting Act (FCRA)
1971 - EEO Revised Order #4/Federal Contractors; 1970 - Occupational Safety and Health Act of 1970 (OSHA); 1968 - Consumer Credit Protection Act of 1968; 1968 - Fair Credit Reporting Act (FCRA); 1967 - Age Discrimination in Employment Act of 1967 (revised 1978); 1966 - Veterans' Readjustment Benefits Act of 1966; 1965 - Executive Order 11246 - Affirmative Action Plans; 1964 - Civil Rights Act of 1964 (amended 1968 &1972) (Equal Employment Opportunity Act of 1972); 1963 - Equal Pay Act of 1963; 1962 - Contract Work Hours and Safety Standards Act 1959 - Labor - Management Reporting and Disclosure Act (LMRDA) (Landrum-Griffin Act); 1947 - Labor - Management Relations Act of 1947/(Taft-Hartley)(amended 1974), 61 Stat. 136; 1947 - Portal-to-Portal Act of 1947 (Gwynne Act); 1938 - Fair Labor Standards Act of 1938 (amended 1949, 1955, 1961, 1966, 1974, 1977, 1985, 1989); 1938 - Holiday Pay Act, 52 Stat. 1246; 1936 - Byrnes Act, 49 Stat. 1899; 1935 - Social Security Act (amended approximately every 2 years), 49 Stat. 620; 1935 - Walsh-Healey Act (Public Contracts Act), 49 Stat. 2036; 1935 - National Labor Relations Act, 49 Stat. 449; 1933 - Unemployment Relief Act (Amended 1976,1992, 1993); 1932 - Norris-LaGuardia Act (Labor Disputes Act),47 Stat. 70; 1931 - Davis-Bacon Act, 46 Stat. 1497. and the 1918 - Minimum Wage Law, 40 Stat. 960.

less with the level of detail apparently required by the arbitrator here. Refusal to enforce an arbitration award on the grounds that it violates public policy is "rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 373 (1987).* The key question here is whether the decision under review" created any explicit conflict with other 'laws and legal precedents.'" *Id.* at 373 (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757, 766 (1983)).

The body of arbitration decisions has generally reflected a recognizable restraint for ordering either party to a contract to perform an illegal act. In *Buckstaff, Co.*, 40 Lab. Arb. 833, 835 (1963), an arbitrator held he could not bring himself to render an opinion and award, which, if carried out, would result in both parties to the arbitration being guilty of unlawful conduct. There, the arbitrator refused to order the discharge of an employee in a situation that would place both the employer and the union in violation of the NLRA. *See also Ex-Cell-O Corp.*, 85 Lab. Arb. 1190 (1985) (agreement cannot be construed to permit a violation of the NLRA as construed by National Labor Relations Board opinions).

Similarly, in *IMC Chemical Group*, 73 Lab. Arb. 215 (1979), the arbitrator refused to permit the union to

undermine national labor policy by claiming a contract violation and seeking a remedy where it would either lead to an illegal arbitral award or "place the Company in the unreasonable predicament" of violating the arbitral award or federal employment law (Title VII).

In the present case, the issue presented for arbitration by the Union not only involved a contract interpretation, but required the arbitrator to make an award that would also accommodate the federal law requirements imposed on the Petitioner. *See Eastern Assoc. Coal Corp. v. UMWA, District 17*, 531 U.S. 57, 121 S. Ct. 462, 469 (2000). Court enforcement of an arbitration award where *no* alternative punishment is substituted for the employer's choice of discipline, must be denied as a violation of public policy, especially where fundamental civil precepts are involved.

As set forth below, neither an arbitrator nor a Union's grievance should be able to effect a result leaving an employer without reasonable grounds of defense to external liabilities and lawsuits.

II

AN ARBITRATOR MUST NOT SECOND-GUESS AN EMPLOYER'S REASONABLE DECISION IN RUNNING ITS BUSINESS.

Two fundamental policies of American jurisprudence have traditionally resolved many disputes involving the

workplace. These principles serve important policy goals and should be guarded against erosion. Only the clearest of statutes or public policies can justify any loss in their general applicability. The decision below threatens these policies applicable to almost 90% of the nation's workers.

First, the "at-will" employment doctrine recognizes that, absent a statutory, contractual or other legal prohibition, an employee serves at the will of the employer. *Crocker v. Piedmont Aviation*, 49 F.3d 735 (D.C. Cir. 1995). No job is guaranteed for life, without a statutory basis or a contract. Any other rule would impede the ability of companies to secure financing, to endure the normal ebb and flow of business cycles, and to take economic risks.

Employees themselves benefit from the entrepreneurial freedom that the at-will doctrine engenders. While some jobs may turn out to be temporary, others may flourish and blossom, benefiting workers, employers, investors and their communities.

Second, the "business judgment rule" recognizes that, absent a statutory, contractual or other legal prohibition, employers must be able to make choices regarding the conduct of their business without interference from the courts. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525 (1984); *Scamardo v. Scott*, 189 F.3d 707, 711 (8th Cir. 1999). Employers often confront the very difficult task of

navigating the myriad economic, social, political and legal risks and requirements that buffet them about. The business judgment rule requires that courts allow entrepreneurs to succeed or fail on their own, absent a strong public policy reason to intercede.

Moreover, the collective-bargaining agreement in this case provided for termination "for cause," but did not specify all the situations that constitute "cause." It is within the proper judgment of the company to make an initial determination of a reasonable cause for termination, subject to review under the terms of the agreement. An "arbitrator may not ignore the plain language of the contract." *Misco, Inc.*, 484 U.S. at 38.

Applying both the at-will doctrine and the business judgment rule to the circumstances of the racial harassment in this case, counsels in favor of a moderate, circumspect approach by the arbitrator and the courts. An employer must have the discretion to develop personnel policies and workplace standards as general or as specific as it wants. An employer should not be restricted from taking action against employees that violate generally accepted norms of behavior, whether such norms are specifically enumerated in writing or not.

No employer should have to assume as a bargaining obligation the requirement to specify in a contract, personnel manual or other written document standards of

behavior, including compliance with the thousands of laws and regulations that apply to personal behavior of its employees, both on and off the job. No employer should have to specify, for example, that murderers may not be able to maintain their employment with the company. No personnel manual should have to explicitly state that aliens who lose their work authorization may lose their jobs. And no company's harassment policy should have to spell out all the situations where the company is authorized to impose sanctions, including termination. This is particularly true in the collective-bargaining context, as such requirements would inject an unnecessary and burdensome level of detail and complexity into an already difficult process.

The arbitrator in this case issued a cramped and narrow interpretation of Tamko's anti-harassment policy that ignored the possibility that the company could discipline an employee for situations not expressly spelled out in the policy. The Court of Appeals compounded this error by giving excessive power to an arbitrator to adopt any remedy that itself is not illegal. Pet. App. 3a. It recognized that courts should generally defer to the judgment of labor arbitrators, but refused to acknowledge that arbitrators should similarly defer to the reasonable business judgment of employers in at-will employment situations. A writ of *certiorari* should be issued to

reinforce the primary legal doctrine that should be taken into account in such situations.

III.

THE DECISION BELOW SPLINTERS EMPLOYER DUTIES TO COMPLY WITH PUBLIC POLICY DICTATES AND COMPLIANCE INCENTIVES IN THE ENFORCEMENT OF FEDERAL LAWS AGAINST DISCRIMINATION.

As important as it is for employers to have the flexibility to run their businesses without improper judicial oversight, they must also be able to understand and apply the multitude of anti-discrimination laws of this country. By the same token, arbitrators and the federal courts that review their decisions must develop as uniform an understanding of the law as possible. Any other system would leave employers and employees confused about their rights and responsibilities, and would tend to deter employers from adopting strong policies that implement the intent of Congress. This Court holds the unique compass that guides errant arbitrators and appellate courts that review their rulings.

The Court of Appeals' ruling below traps Tamko, and similarly situated employers, in an untenable position. While arbitration is intended to streamline the process of dispute resolution, most employers would just as soon

avoid the process altogether if they can agree with their employees over the proper result in a particular case.

Petitioner has documented several cases in which courts have found companies liable for discrimination against third parties under 42 U.S.C. §1981. Pet. at 22. The petition notes other cases showing that Tamko might be liable for workplace discrimination claims brought by other workers who could claim that taking no action against the harasser here creates an unlawful hostile work environment. *Id.* Yet, the arbitrator issued a ruling that ignored these legalities and focused solely on one sentence of Tamko's Prevention of Harassment Policy relating to harassment against co-workers. He ignored a subsequent sentence that states, "It is TAMKO's policy that *no form of harassment* should be present in the workplace." (emphasis added).

If this arbitrator's decision is allowed to stand, an employer with an employee that is racially harassing third parties has two choices: (1) terminate the employee and take its chances with the arbitrator, or (2) impose some lesser sanction, if any, and take its chances with other employees or the third-party contractor. Either way, the employer faces litigation for making a decision to voluntarily comply with anti-discrimination laws.

But "[v]oluntary compliance with Title VII also is an important public policy. Congress intended cooperation

and conciliation to be the preferred means of enforcing Title VII." *W.R. Grace & Co.*, 461 U.S. at 770-71. Plainly, the federal courts have the expertise to recognize the importance of these interests.

It is particularly important, in situations where the interests of a variety of parties conflict, that this Court provide a measure of rationality and balance to employers that want to act aggressively enough to prevent racial harassment in the workplace. Not all arbitrators possess this expertise, but their decisions must be held accountable for considering (if not understanding) the legal requirements of statutes with which companies must comply. We are not suggesting that public policy requires that an employer terminate an employee in the circumstances of this case; rather, we are suggesting that an arbitrator should understand that termination is a reasonable response by an employer in this situation.

The present decision, however, shifts the balance of American labor relations by forcing employers to shoulder the entire responsibility of acting in compliance with dictated public policies. An arbitrator's wilful rejection of these burdens is a rejection of public policy.

CONCLUSION

For these reasons, and for each of the reasons set forth in greater detail in Tamko Roofing Product, Inc.'s Petition, *amici curiae* respectfully request that a writ of *certiorari* issue to review the judgment of the court of appeals.

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